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Business Associations and Professions

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Business Associations and Professions

Business Associations and Professions; advertising by attorneys

Business and Professions Code §§ 6157, 6157.1, 6157.2, 6157.3, 6157.4, 6157.5, 6157.6, 6157.7 (new).
AB 208 (Horcher); 1993 STAT. Ch. 518

Existing law prohibits the use of false or misleading statements in advertising¹ concerning the performance of professional services.² Chapter 518 will extend this prohibition to specifically cover advertisements by attorneys.³ Chapter 518 prohibits any advertising which guarantees the outcome of litigation or contains statements or symbols suggesting that the member⁴ featured in the ad can generally obtain immediate cash or a speedy settlement.⁵ Chapter 518 also bars any dramatization of events or

1. See CAL. BUS. & PROF. CODE § 6157(b) (enacted by Chapter 518) (defining advertising as any communication by television, radio, print, or mailing which solicits for the employment of legal services and is directed to the general public).

2. *Id.* § 17500 (West 1987); *Leoni v. State Bar*, 39 Cal. 3d 609, 625, 704 P.2d 183, 192, 217 Cal. Rptr. 423, 432 (1985) (holding that the advertising of professional services is constitutionally protected, but the state has the power to regulate false or misleading statements contained within such advertisements); see also *Jacoby v. State Bar*, 19 Cal. 3d 359, 377, 562 P.2d 1326, 1338, 138 Cal. Rptr. 77, 97 (1977) (stating that attorney advertisements are constitutionally protected).

3. CAL. BUS. & PROF. CODE § 6157.1 (enacted by Chapter 518).

4. See CAL. BUS. & PROF. CODE § 6157(a) (enacted by Chapter 518) (defining member as a member in good standing of the State Bar). The definition also encompasses the term "lawyer" and "attorney" and includes any agent of the member and any law firm doing business in the State of California. *Id.*

5. *Id.* § 6157.2 (a)-(b) (enacted by Chapter 518); see *In re R.M.J.*, 455 U.S. 191, 205 (1982) (allowing attorneys to disseminate advertising which listed their areas of practice); *Bates v. State Bar*, 433 U.S. 350, 383-84 (1977) (holding that blanket suppression of lawyer advertisements violated the First Amendment, but leaving room for the individual states to regulate lawyer advertising). The court in *In re R.M.J.*, however, allowed the state to place reasonable restrictions on advertising which are necessary to prevent false or misleading statements. See *id.* at 207; *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 479 (1988) (holding that a lawyer is allowed to mail out advertisements for the lawyer's services to potential clients with particular legal problems that the attorney is aware of); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646-47 (1985) (allowing attorneys to disseminate advertising which targets specific segments of the population that may be in need of certain litigation services); SENATE COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF AB 208, at 3 (May 26, 1993) (stating that Chapter 518 was designed to bring back respectability to the legal profession by controlling misleading advertisements); John Ratino, Note, *In re R.M.J.: Reassessing the Extension of First Amendment Protection to Attorney Advertising*, 32 CATH. L. REV. 729, 757-58 (1983) (stating that a simple prohibition of false or misleading advertising is all that is necessary to protect consumers, and that attorney advertising should not be subject to more stringent regulations); Charles Camp, *State Bar Stepping Into the Quagmire Over Advertising*, DALLAS MORNING NEWS, June 17, 1993, at 1D (stating that the Texas Bar was considering regulations on attorney advertising which were more stringent than the regulations in Florida); Phillip Hager, *Movement Goes to Rein in Lawyer Ads*, L.A. TIMES, Feb. 22, 1993, at A3 (discussing AB 208 and the arguments for and against its passage); Lorie Hearn, *Disgruntled Ex-Client Gets \$1.8 Million From Sam Spital*, SAN DIEGO UNION-TRIB., Oct. 3, 1993, at B1 (reporting on a client who received a hefty settlement after bringing a malpractice suit against her lawyer based on his television advertisements). See generally *The Florida*

any impersonation of the member or client unless so disclosed.⁶ Additionally, any member who offers representation on a contingent basis must also disclose whether the client will be held liable for any costs if a recovery is not obtained.⁷

Under Chapter 518, any advertisement disseminated by a lawyer referral service must disclose whether the attorneys on the referral list paid more than their proportional share of the actual cost for publication of the advertisement.⁸ All advertisements for a member which are not paid for by the member must contain both the name of the person actually paying for the advertisement and the business relationship between that person and the member.⁹ Chapter 518 requires that any person or member who pays for an advertisement soliciting legal services must retain a true and correct copy of the advertisement for a one year period.¹⁰ Any provision of Chapter 518 which is found to violate either the Constitution of the State of California or the United States is severable and the remaining provisions will still be enforceable.¹¹

ELG

Bar: Petition to Amend the Rules of the Florida Bar - Advertising Issues, 571 So. 2d 451 (1990) (holding that regulations promulgated by the Florida Bar regarding advertising by attorneys were constitutional).

6. CAL. BUS. & PROF. CODE § 6157.2(c) (enacted by Chapter 518). *See generally* The Florida Bar - Advertising Issues, *supra* note 3, 571 So. 2d at 461 (upholding the constitutionality of a total ban on any dramatization utilized in the context of attorney advertisements).

7. CAL. BUS. & PROF. CODE § 6157.2(d) (enacted by Chapter 518).

8. *Id.* § 6157.4 (enacted by Chapter 518); *see id.* § 6155 (West 1992) (stating the general principles regarding the operation and organization of a lawyer referral service).

9. *Id.* § 6157.3 (enacted by Chapter 518).

10. *Id.* § 6157.6 (enacted by Chapter 518). *See generally*, The Florida Bar - Advertising Issues, *supra* note 3, 571 So. 2d at 462 (upholding the constitutionality of a rule requiring attorneys to retain advertisements for three years).

11. CAL. BUS. & PROF. CODE § 6157.7(b) (enacted by Chapter 518).

Business Associations and Professions; advertising—900 numbers

Business and Professions Code §§ 17539.5, 17539.55 (amended).
AB 851 (Speier); 1993 STAT. Ch. 628

Under existing law it is unlawful to encourage the use of an information-access service¹ through certain activities.² Those activities include, but are not limited to, requiring a caller³ to call more than one 900 number⁴ or a single 900 number more than once to receive goods or services being solicited,⁵ using a number other than a 900 number to automatically access the service, and advertising that the information-access service is free.⁶

Under Chapter 628, it is unlawful to refer callers from one number to a 900 number unless it is clearly and conspicuously⁷ stated in the solicitation that a referral will be made, along with the cost of the additional call.⁸ Also, Chapter 628 states that it is unlawful to ask callers to accept a collect call, unless it is clearly and conspicuously stated in the

1. See CAL. BUS. & PROF. CODE § 17539.5(a)(6) (amended by Chapter 628) (defining information-access service as a telecommunications service in which the caller is assessed a charge for placing or completing the call that is greater than, or in addition to, the charge for transmission of the call). This definition includes both 900 and 976 prefix numbers. *Id.*

2. *Id.* § 17539.5(b)(1)-(4),(7)-(9), (amended by Chapter 628); see *id.* § 17200 (West Supp. 1993) (stating that all violations of California Business and Professions Code §§ 17500-17577.5 are violations of unfair competition prohibitions); *id.* § 17534 (West 1987) (stating that any violation of California Business and Professions Code §§ 17500-17577.5 is a misdemeanor); *id.* § 17536 (West Supp. 1993) (stating that the civil penalty for a violation of California Business and Professions Code §§ 17500-17577.5 can be a fine of no more than \$2500 for each offense).

3. See *id.* § 17539.5(a)(2) (amended by Chapter 628) (defining caller).

4. See *id.* § 17539.5(a)(7) (amended by Chapter 628) (defining 900 number as any prefix used to access an information-access service). This includes both 900 and 976 prefixes. *Id.*

5. See *id.* § 17539.5(a)(11) (amended by Chapter 628) (defining solicitation).

6. *Id.* § 17539.5 (b)(3), (4), (8) (amended by Chapter 628); see Arthur Winston, *CA to Regulate Sweeps' 900 Nos.*, DM NEWS, January 18, 1993, at 12, available in LEXIS, Nexis Library, Currnt File (interpreting California Business and Professions Code §§ 17539.5 and 17539.55); *New California Law Cracks Down on 900 Services*, 9 UNITED COMMUNICATIONS GROUP 241 (Dec. 14, 1992), available in LEXIS, Nexis Library, Currnt File (stating that there will be tighter restrictions on 900 number services beginning January 1, 1993).

7. See *Bantam Books v. Federal Trade Comm'n*, 275 F.2d 680, 683 (2d Cir. 1960) (denying the petitioner's request for a more specific standard than a clear and conspicuous requirement, without showing that compliance would constitute an undue burden); cf. *People v. Custom Craft Carpets*, 159 Cal. App. 3d 676, 682, 206 Cal. Rptr. 12, 15-16 (1984) (holding that the use of the clear and conspicuous standard in an injunction order is sufficiently clear).

8. CAL. BUS. & PROF. CODE § 17539.5(b)(5)-(6) (amended by Chapter 628); see CALIFORNIA ASSEMBLY COMMITTEE ON CONSUMER PROTECTION, GOVERNMENTAL EFFICIENCY AND ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 851, at 1 (Mar. 31, 1993) (stating that Chapter 628 seeks to crack down on misleading and fraudulent advertising of contests which encourages people to call a 900 number to claim a prize); cf. N.Y. GEN. BUS. § 520-b (McKinney Supp. 1993) (regulating the use of a 900 number to solicit or market secured credit cards).

solicitation that the caller will be asked to accept one or more collect calls, and that the caller will bear the cost of those calls.⁹

Under existing law it is unlawful to operate a sweepstakes¹⁰ through the use of a 900 number without registering with the Department of Justice (Department).¹¹ Chapter 628 adds that it is unlawful to refer to this registration in any contact with the public.¹² Chapter 628 further adds that it is unlawful to imply that the Department approves of the sweepstakes through the registration.¹³

AMP

Business Associations and Professions; advocacy of health care

Business and Professions Code § 2056 (new).

AB 1676 (Margolin); 1993 STAT. Ch. 947

Chapter 947 provides that it is against public policy¹ for a person,² in an employment or contractual relationship with a physician³ or surgeon,

9. CAL. BUS. & PROF. CODE § 17539.5(b)(6) (amended by Chapter 628).

10. See *id.* § 17539.5(a)(12) (amended by Chapter 628) (defining sweepstakes).

11. *Id.* § 17539.55(a) (amended by Chapter 628); see *id.* (requiring that registration occur within ten days of advertising the sweepstakes); see also *United States v. Goodman*, 934 F.2d 235, 239 (8th Cir. 1993) (holding that a promotion asking people to call a 900 number to claim a prize was not an illegal promotion because it did not involve some affirmative misrepresentation or active concealment with an intent to deceive); cf. *Glick v. MTV Network*, 796 F. Supp. 743, 748 (S.D. N.Y. 1992) (holding that it is not unlawful under New Jersey gambling laws to hold a sweepstakes, in which callers enter by calling a 900 number, if there is an alternative cost-free method of entering).

12. CAL. BUS. & PROF. CODE § 17539.55(d) (amended by Chapter 628).

13. *Id.*; see Laurel Pallock, *Protection Against Phone Fraud*, S.F. CHRON., Feb. 2, 1993, at B5 (discussing the registration requirements, disclosure requirements, and prohibitions imposed on 900 number companies). See generally Bruce I. McDaniel, Annotation, *What Constitutes "False Advertising" of Food Products or Cosmetics Within §§ 5 and 12 of the Federal Trade Commission*, 50 A.L.R. FED. 16, § 10b (1992) (discussing F.T.C. decisions against advertisers using a false or deceptive advertising endorsement by a testing organization or government agency).

1. See *Safeway Stores v. Retail Clerks Int'l Ass'n*, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953) (defining public policy as a legal principle which mandates that no citizen be allowed to act contrary to the public good or in such a way as to harm the public).

2. See CAL. BUS. & PROF. CODE § 2032 (West Supp. 1993) (defining person).

3. See CAL. EVID. CODE § 990 (West 1966) (defining a physician as an individual authorized to engage in the practice of medicine in any state or nation); cf. *Interstate Truck Leasing v. Bryan*, 537 So. 2d 53, 54 (Ala. Civ. App. 1988) (referring to a physician as a medical doctor, surgeon, or chiropractor); *Clemons v. Fairview Medical Ctr.*, 449 So. 2d 788, 789 (Ala. 1984) (defining a practitioner as a physician, dentist, or podiatrist who holds a license); *Gates v. Kilcrease*, 188 P.2d 247, 250 (Ariz. 1947) (defining a physician as a licensed person

to terminate or penalize that physician or surgeon primarily for promoting suitable health care⁴ for his patient.⁵ Chapter 947 prohibits this provision from being interpreted as: (1) Prohibiting a payor from making a determination not to pay for certain medical care;⁶ (2) preventing certain entities⁷ from enforcing reasonable peer review or utilization review protocols;⁸ or (3) forbidding the Medical Board of California⁹ or the

who is authorized to practice medicine or osteopathy).

4. See CAL. BUS. & PROF. CODE § 2056(b) (enacted by Chapter 947) (explaining that to promote medically adequate health care means to either: (1) Appeal a payor's decision to deny coverage for medical treatment; or (2) protest a payor's decision that the physician reasonably believes impairs that physician's ability to provide adequate health care for that professional's patient); *id.* (stating that a physician's act of protesting a payor's decision must be done in such a manner that is consistent with that degree of learning and skill ordinarily possessed by respectable physicians practicing in similar localities under like circumstances); see also *id.* § 2056(e) (enacted by Chapter 947) (providing that medically appropriate health care must be defined by the medical staff of a hospital and ratified by the governing body).

5. *Id.* § 2056(b) (enacted by Chapter 947); see *id.* § 809.05(d) (West 1990) (mandating that a hospital's governing body and its medical staff act exclusively in the interest of promoting and maintaining quality patient care); *id.* § 2056(a) (enacted by Chapter 947) (explaining that the purpose of this law is to protect a physician from people who may retaliate against that physician for advocating medically appropriate health care for that physician's patient); *id.* § 2056(b) (enacted by Chapter 947) (stating that, in California, the public policy is to have physicians and surgeons promote adequate medical care for their patients); *Gantt v. Sentry Ins. Co.*, 1 Cal. 4th 1083, 1095, 824 P.2d 680, 687-88, 4 Cal. Rptr. 2d 874, 881-82 (1992) (stating that public policy tied to policies outlined in constitutional or statutory law strikes the appropriate balance between the interests of employers, employees, and the public); *Sequoia Ins. Co. v. Superior Court*, 13 Cal. App. 4th 1472, 1475, 16 Cal. Rptr. 2d 888, 889 (1993) (concluding that, in order to pursue a wrongful discharge case based on public policy grounds, the conduct must be forbidden by a statute or a constitutional provision); see also CAL. CIV. CODE § 56.05(c) (West Supp. 1993) (defining a patient as an individual, dead or alive, who has been given medical treatment from a health care provider); cf. *Ticklin v. Department of Professional Regulation*, 550 So. 2d 518, 519 (Fla. Dist. Ct. App. 1989) (reversing the Department of Professional Regulation's decision to increase the recommended penalty for a practitioner's gross negligence where the order failed to set forth legally sufficient reasons for the increased penalty).

6. See CAL. INS. CODE § 791.10(a)(1)-(2) (West Supp. 1993) (providing that if an insurance company makes an adverse decision with regard to a policyholder's insurance coverage, then the company is obligated to either state the reasons for its decision in writing, or apprise the policyholder of that person's rights with respect to the insurance company's decision); cf. *Sanfilippo v. State Farm Mut. Auto. Ins. Co.*, 535 P.2d 38, 39-40 (Ariz. Ct. App. 1975) (affirming a lower court's finding that charges for certain physical therapy treatments provided by unlicensed medical assistants were not recoverable as medical expenses under the insurance policy).

7. See CAL. BUS. & PROF. CODE § 2056(d) (enacted by Chapter 947) (listing the following as applicable entities: medical groups, independent practice associations, preferred provider organizations, foundations, hospital medical staff, a hospital governing body, or payors).

8. See *id.* § 809.05 (West 1990) (providing that licentiates must conduct peer reviews); *id.* § 809.5(a) (West Supp. 1993) (giving a peer review committee the authority to immediately suspend or restrict a licentiate's privileges where a patient's health is in imminent danger); *id.* § 2307(c) (West Supp. 1993) (stating that a person whose license is revoked or suspended may petition to be reinstated and be heard by the Division of Medical Quality, an administrative law judge, or a medical quality review committee); CAL. GOV'T CODE § 12529(a) (West 1992) (stating that the Health Quality Enforcement Section of the Department of Justice has the charge of pursuing cases against licensees and applicants in the medical profession); see also CAL. BUS. & PROF. CODE § 1244(a)(1)-(4)(A)-(G) (West Supp. 1993) (allowing nondiagnostic general health assessment programs to exist under certain conditions, such as requiring that the program have a supervisory committee consisting of at least one licensed physician and surgeon, and one licensed laboratory technologist); cf. ALA. CODE § 34-24-402(1)-(2) (1991) (directing the Alabama Impaired Physicians Committee to develop procedures for reporting botched

governing body of a hospital from taking disciplinary measures¹⁰ against a physician or surgeon.¹¹

APW

Business Associations and Professions; arbitration of attorney's fees

Business and Professions Code §§ 6200, 6201, 6203 (amended);
Code of Civil Procedure §§ 86, 1060 (amended).
AB 1272 (Connolly); 1993 STAT. Ch. 1262

physician operations); ARIZ. REV. STAT. ANN. § 32-1401(16) (Supp. 1993) (defining medical peer review as a doctor's participation in the assessment and evaluation of a patient's medical care, and activities connected with an institution's decision to allow a person to practice medicine at that particular health care facility); *id.* § 36-445.01(A) (Supp. 1993) (stating that all peer reviews of health care providers must remain confidential, except under certain situations, such as proceedings before the Board of Medical Examiners); *id.* § 36-2401(4) (Supp. 1993) (explaining that a quality assurance process is a process by which committees review the quality of health care in facilities by looking at such things as professional practices, experience, and training); *id.* § 36-2402(A) (Supp. 1993) (providing that the standards for a quality assurance program must be in writing and accessible to all licensed health care providers who may be subjected to review). *See generally* Andrea G. Nadel, Annotation, *Hospital's Liability for Negligence in Failing to Review or Supervise Treatment Given By Doctor, or to Require Consultation*, 12 A.L.R.4th 57 (1982) (exploring whether a health care institution may be held liable for the death or injury of a patient based on one of the following theories: (1) The hospital was negligent in failing to review or oversee the treatment administered by the physician; or (2) the hospital was negligent in failing to require that the physician speak with a specialist concerning the patient's condition).

9. *See* CAL. BUS. & PROF. CODE § 101 (West Supp. 1993) (naming the entities, including the Medical Board of California, which comprise the Department of Consumer Affairs); *id.* § 2001 (West 1990) (stating that the Medical Board of California is comprised of 19 members, of which 17 members are appointed by the Governor and then confirmed by the Senate).

10. *See* *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 227, 461 P.2d 375, 385, 82 Cal. Rptr. 175, 185 n. 21 (1969) (noting that gross immorality constitutes sufficient grounds for taking disciplinary measures against a doctor).

11. CAL. BUS. & PROF. CODE §§ 2056(d), (f)-(g) (enacted by Chapter 947); *see id.* § 809.05(a) (West 1990) (declaring that the governing body of a hospital must give deference to a peer review body's actions); *cf.* ARIZ. REV. STAT. ANN. § 36-441(A) (Supp. 1993) (stating that any member of a health care utilization committee, who acts without malice, will not be subjected to liability for assisting the committee); COLO. REV. STAT. ANN. § 12-36.5-203(1)(a)-(d) (1991) (providing that certain persons, such as members of the professional review body, will not be liable for participating in, or helping a professional review committee's examination of certain professional's conduct); KY. REV. STAT. ANN. § 311.139 (Baldwin 1992) (stating that a private review agent will not be allowed to disclose a patient's medical records obtained during the course of utilization review activities, without following the proper procedures for protecting that patient's confidentiality).

Under existing law the Board of Governors of the State Bar (Board)¹ is required to develop and implement a system to govern arbitration of disputes concerning attorney's fees.² Chapter 1262 authorizes the Board to require the State Bar to place any attorneys who refuse to pay final arbitration awards on involuntary inactive status until the award is satisfied.³

Prior law required an attorney bringing suit to recover fees to deliver a written notice with the summons notifying the client of the right to arbitration in all actions with the exception of those filed in small claims court.⁴ Chapter 1262 eliminates the previously described exemption for actions brought by attorney's in small claims court.⁵

Existing law provides that actions to confirm, correct, or vacate an arbitration award may be brought in the court of appropriate jurisdiction.⁶

1. See CAL. BUS. & PROF. CODE § 6010 (West 1990) (enumerating the general provisions governing the Board).

2. *Id.* § 6200 (amended by Chapter 1262); see *id.* (establishing the procedures by which the Board governs arbitration); ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1272, at 1 (May 12, 1993) (discussing the status of the state arbitration programs and stating that the purpose of Business and Professions Code § 6200 was the implementation of a program for arbitration of fees or costs charged by members of the State Bar for professional services).

3. CAL. BUS. & PROF. CODE § 6203 (d)(1) (amended by Chapter 1262); see *id.* § 6203(d)(2)-(5) (amended by Chapter 1262) (establishing procedures governing enforcement of penalties against violating attorneys); see also *id.* § 6007(b) (West 1990) (authorizing the State Bar to place an attorney on suspension pursuant to this section); ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1272, at 3 (May 12, 1993) (comparing the program to a similar New Jersey rule of court that places attorneys who refuse to pay arbitration awards on involuntary inactive status and has only penalized six attorneys since its implementation in the mid-1980s); cf. N.J. RULES OF CT. § 1:20A-3(e) (1993) (authorizing the fee committee to place an attorney who fails to comply with an award on temporary suspension according to § 1:20-4(i)).

4. 1990 Cal. Legis. Serv., ch. 483, sec. 6, at 2341 (amending CAL. BUS. & PROF. CODE § 6201). See generally 1 B.E. WITKIN, CALIFORNIA PROCEDURE, *Attorneys* §§ 179-82 (3d ed. Supp. 1993) (setting forth the provisions governing arbitration of fee disputes).

5. CAL. BUS. & PROF. CODE § 6201(a) (amended by Chapter 1262); see ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1272, at 2 (May 12, 1993) (describing the intent behind Chapter 1262 as an attempt to make the small claims court environment an appropriate forum to resolve attorney fee disputes following the increase in the jurisdictional limit in small claims actions); see also CALIFORNIA JUDGES BENCHMARK, SMALL CLAIMS COURT AND CONSUMER LAW, at 1-3 (4th ed. 1992) (providing an overview of the philosophy governing small claims court that encourages an informal and expedient means by which to resolve disputes).

6. CAL. BUS. & PROF. § 6203(b) (amended by Chapter 1262); see *id.* (stating that if there is an action pending then jurisdiction lies with the court in which the action is pending, but if no action is pending then jurisdiction is based upon the amount of the arbitration award).

Chapter 1262 specifies the court of proper jurisdiction to bring such an action based upon the amount of the dispute.⁷

SMK

Business Associations and Professions; business solicitations

Business and Professions Code § 17533.6 (new)
AB 532 (Morrow); 1993 STAT. Ch. 348

Under existing law, false or misleading statements are prohibited in advertising.¹ Chapter 348 makes it unlawful for nongovernmental entities to solicit information or funds through the use of a mailing bearing a symbol or name that could reasonably be construed as implying a governmental connection or endorsement.² Chapter 348 does not impose a penalty if the look-alike mailing bears a disclaimer of governmental affiliation.³

ELG

7. CAL. CIV. PROC. CODE § 86(a)(10)(b)(1)-(6) (amended by Chapter 1262) (granting original jurisdiction to the municipal and justice court in actions to confirm, correct, or vacate awards involving \$25,000 or less).

1. CAL. BUS. & PROF. CODE § 17500 (West 1992); *see id.* § 17536 (West 1992) (authorizing a civil penalty for violations of §§ 17500, 17533.6). Chapter 348 allows both criminal and civil sanctions for the use of false or misleading statements in advertising. *Id.*; *see also* *Walnut Creek Manor v. Fair Employment & Hous. Comm.*, 54 Cal. 3d 245, 272, 814 P.2d 704, 721, 284 Cal. Rptr. 718, 734 (1991) (stating that the civil violation is limited to \$2,500 for each person deceived rather than \$2,500 for each act of deception); *People v. Dollar Rent-A-Car Systems*, 211 Cal. App. 3d 119, 128, 259 Cal. Rptr. 191, 197 (1989) (imposing both civil and criminal sanctions for violations of § 17500).

2. CAL. BUS. & PROF. CODE § 17533.6 (enacted by Chapter 348); *see id.* (providing that funds could be both for the purchase of a product or for membership or contribution fees); 39 U.S.C. § 3001(h) (1990) (classifying non-mailable matter as any mailing from a nongovernmental entity which appears to be affiliated with the government); *id.* § 3005 (1990) (providing sanctions for mailings which appear to be from the government, but are from nongovernmental entities); *Congress is Urged to Pass Legislation to Stop Government Look-Alike Mailings*, BUREAU OF NATIONAL AFFAIRS DAILY REPORT TO EXECUTIVES, Mar. 2, 1989, at 1 (stating that groups had attempted to deceive consumers with mailings that looked like they came from a government source). The article also noted that language in the federal law was criticized because "reasonably construed" could be left open to subjective judgment. *Id.*; *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 532, at 2 (May 11, 1993) (stating that residents in San Diego had been victimized by a mail fraud scam which utilized look-alike government logos).

3. CAL. BUS. & PROF. CODE § 17533.6 (b)(c) (enacted by Chapter 348); *see id.* (stating that the solicitation must conspicuously state that the product or service has not been approved by the government and is not endorsed by the government). The envelope or outside cover of the solicitation must also legibly state that the letter or package is not a government document. *Id.*

Business Associations and Professions; class actions—funding for the California Legal Corps

Business and Professions Code § 6034 (new); Code of Civil Procedure § 383 (new).

SB 536 (Petris); 1993 STAT. Ch. 863

Existing law provides for class action suits.¹ Existing law also requires that interest earned from attorneys' client trust funds² be allocated to the California State Bar for funding legal services³ to indigent persons.⁴

1. CAL. CIV. PROC. CODE § 382 (West 1973); *see id.* (outlining procedure for filing and maintaining class action suits); *see also* Daar v. Yellow Cab Co., 67 Cal. 2d 695, 704, 433 P.2d 732, 739, 63 Cal. Rptr. 724, 731 (1967) (stating that two requirements must be met before bringing a class action suit: (1) There must be an ascertainable class; and (2) there must be a well defined community interest in the questions of law and fact that are involved affecting the parties to be represented); Danzig v. Superior Court, 87 Cal. App. 3d 604, 612, 151 Cal. Rptr. 185, 190 (1978) (providing that a class action relieves members of the burden of participating in the action); Hamwi v. Citinational-Buckeye Inv. Co., 72 Cal. App. 3d 462, 471, 140 Cal. Rptr. 215, 220 (1977) (stating that a class action is appropriate only when there exists a sufficient community of interest in common questions of law and fact so that the proceeding in the class action will result in benefits both to the litigants and the court); *cf.* FED. R. CIV. P., 23 (specifying detailed conditions for class actions); American Pipe & Const. Co. v. Utah, 414 U.S. 538, 551-52 (1974) (stating that Federal Rule of Civil Procedure Rule 23 is not designed to afford class representation to only those who are active participants in, or even aware of the proceedings in a suit prior to order that the suit shall or shall not proceed as a class action); Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992) (stating that a common nucleus of operative fact is usually enough to satisfy the commonality requirement for class certification), *cert. denied*, 113 S. Ct. 972 (1993); *In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1127-28 n.33 (7th Cir. 1979) (providing that class actions are primarily a device to vindicate the rights of individual class members), *cert. denied*, 444 U.S. 870 (1979). *See generally* 4 B.E. WITKIN, CALIFORNIA PROCEDURE, Pleading § 194 (3d ed. 1985) (noting that the California statutory coverage of class actions is covered by California Code of Civil Procedure § 382); *id.* § 195 (3d ed. 1985) (listing four prerequisites to bringing a class action in compliance with Federal Rule 23: (1) The class is so numerous that joinder is impractical; (2) there are common questions of law or fact; (3) the claims or defenses of the representatives are typical of the class; and (4) the representatives will fairly and adequately protect the interests of the class).

2. *See* CAL. BUS. & PROF. CODE § 6211(a) (West 1990) (stating that when an attorney or law firm in the practice of law receives or disburses trust funds, they must maintain an interest bearing trust account and must deposit all client deposits therein that are nominal in amount, or are on deposit for a short period of time, for which the interest earned will be paid to the State Bar of California).

3. *See id.* § 6213(a)(1)-(2) (West 1990) (defining qualified legal services project as a nonprofit project incorporated and operated exclusively in California which provides legal services without charge to indigent persons or a program operated exclusively in California by a nonprofit law school accredited by the State Bar); *see also id.* § 6210 (West 1990) (stating the legislature's purpose in providing legal services); *id.* § 6214 (West 1990) (providing additional criteria apart from California Business and Professions Code § 6213(a) for qualifying for legal service project funds).

4. *Id.* §§ 6211(a), 6216 (West 1990); *see id.* § 6211(a) (West 1990) (specifying that an attorney or law firm must establish and maintain an interest bearing demand trust account whereupon the interest earned from such accounts must be paid to the State Bar of California); *id.* § 6213(d) (West 1990) (defining indigent person as a person whose income is 125% or less of the current poverty threshold established by the United States Office of Management, or who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act); *id.* § 6216 (West 1990) (providing that the State Bar will distribute all monies received under this program for legal services to indigent persons); *see also* Carroll

Chapter 863 creates the California Legal Corps which shall provide funding and support for preventive law projects, alternative dispute resolution efforts, legal support for victims of disaster, and other activities designed to improve access to the legal system for all Californians.⁵

Chapter 863 further requires a court to determine the total amount payable to all class members of a class action, and to set a reporting date for notifying the court of actual amounts received by class members so that the court may amend the judgment and direct the defendant to pay any unpaid residual, plus interest, in any manner the court determines is consistent with the underlying purpose of the action, including payment to child advocacy programs,⁶ and to the California Legal Corps.⁷ No

v. State Bar of Cal., 166 Cal. App. 3d 1193, 1198, 213 Cal. Rptr. 305, 307 (1985) (remarking that California Business and Professions Code § 6211 establishes a mandatory program for depositing short term client trust funds in an aggregate account from which the interest will be used to fund indigent legal services), *cert. denied*, 474 U.S. 848 (1985); *cf.* 42 U.S.C. §§ 2996-2996i (1988 & Supp. II 1990) (setting forth provisions of the Legal Services Corporation Act of 1974); N.C. GEN. STAT. § 7A-474.2 (Supp. 1992) (defining Legal Services of North Carolina, Inc., as a not-for-profit organization funded by the Legal Services Corporation Act and from the interest earned on the North Carolina State Bar's Lawyers' Trust Accounts program); *Grassley v. Legal Servs. Corp.*, 535 F. Supp. 818, 823 (S.D. Iowa 1982) (stating that individuals who cannot afford to address their legal grievances are intended to be benefitted by the Legal Services Corporation).

5. CAL. BUS. & PROF. CODE § 6034(a) (enacted by Chapter 863); *see id.* (specifying that the California Legal Corps will include law school students, active and retired attorneys, and recent law school graduates). The California Legal Corps will be administered by the California Legal Corps Commission which will consist of eleven members, of whom, seven members will be named by the Board of Governors, two members will be named by the Governor, one member named by the Senate Rules Committee, and one member named by the Speaker of the Assembly. *Id.* § 6034(c) (enacted by Chapter 863). Programs providing legal assistance and representation for children will be a high priority of the California Legal Corps. *Id.* § 6034(d) (enacted by Chapter 863).

6. *See* CAL. WELF. & INST. CODE § 16500 (West 1991) (providing that the state must establish and support a public system of statewide child welfare services through the department and county welfare departments). *See generally* *Rivera v. Marcus*, 696 F.2d 1016, 1019 (2d Cir. 1982) (providing an example of a child advocacy program with the Connecticut Child Advocacy Center's representation of the interests of a foster child during this proceeding); Bruce C. Hafen, *Exploring Test Cases in Child Advocacy*, 100 HARV. L. REV. 435, 439 (1986) (book review) (stating that child advocacy litigation may be largely another form of advocacy designed to benefit disadvantaged racial or economic classes).

7. CAL. CIV. PROC. CODE § 383(b) (enacted by Chapter 863); *see id.* § 383(a) (enacted by Chapter 863) (providing that the unpaid residuals in class action suits are distributed to further the purpose of the action, or to promote justice for Californians); *see also* *Six Mexican Workers v. Arizona Citrus Growers*, 641 F. Supp. 259, 269 (D. Ariz. 1986) (providing that the maximum amount of money to be distributed from a class action suit can be no more than the total amount of individually determined damages); *In re Folding Carton Antitrust Litigation*, 557 F. Supp. 1091, 1100, 1103 (N.D. Ill. 1983) (stating that certain defendants and former class members do not have a legal or equitable right to recover the funds that have been deposited into an escrow account if they have not filed timely claims); *California v. Levi Strauss & Co.*, 41 Cal. 3d 460, 474-75, 715 P.2d 564, 572-73, 224 Cal. Rptr. 605, 613-14 (1986) (discussing appropriate methods for distributing damages in consumer class actions); *Bruno v. Superior Court*, 127 Cal. App. 3d 120, 129, 179 Cal. Rptr. 342, 346-47 (1981) (establishing that the due process rights of class members must be protected before any surplus money is distributed by the court); *see also* 23 H. NEWBURG, *NEWBURG ON CLASS ACTIONS*, § 10.24 at 390-91 (2d ed. 1985) (providing that the aggregate liability of the defendant can be no larger than its liability if all class members individually asserted their claims, and that the deterrence function of the underlying claim can be

regulations adopted by the Board of Governors that pertain to the California Legal Corps shall be effective until approved by the California Supreme Court.⁸

MBB

Business Associations and Professions; contractors' action for compensation—licensure

Business and Professions Code § 7031 (amended).
AB 628 (Frazee); 1993 STAT. Ch. 797

Under existing law, a person¹ who brings a civil action to recover compensation for the performance of contractor² services must allege that the contractor was licensed³ at the time of the performance.⁴ Existing law

achieved if the unclaimed residue of an aggregate class recovery is distributed for the benefit of the class members, granted to the state government as unclaimed funds, or distributed by discretion of the court to a public service nonprofit organization).

8. CAL. BUS. & PROF. CODE § 6034(e) (enacted by Chapter 863).

1. See CAL. BUS. & PROF. CODE § 7025 (West 1975) (defining person).

2. See *id.* § 7026 (West Supp. 1993) (defining contractor); *Albaugh v. Moss Construction Co.*, 125 Cal. App. 2d 126, 131, 269 P.2d 936, 939 (1954) (defining a contractor as one who undertakes to, or offers to undertake, to submit a bid to construct, alter, repair, add to, subtract from, improve, move, wreck, or demolish, any building); *People v. Rogers*, 124 Cal. App. 2d Supp. 909, 911, 271 P.2d 231, 232 (1954) (defining an independent contractor as one who renders services for a specified result under the control of his principal as to the result of his work only, and not as to the means by which the result is accomplished).

3. See CAL. BUS. & PROF. CODE § 7072 (West 1975) (regulating issuance of contractor's licenses).

4. *Id.* § 7031(a) (amended by Chapter 797); see *id.* (requiring a contractor, who brings an action to recover compensation for any act for which a contractor's license is required, to allege that the contractor was licensed at all times during the performance of the act which gives rise to the civil action, regardless of the merits of the cause of action); *Hydrotech Systems v. Oasis Waterpark*, 52 Cal. 3d 988, 995, 803 P.2d 370, 374, 277 Cal. Rptr. 517, 521 (1991) (declaring that the purpose of the licensing law is to protect the public from incompetence and dishonesty); *Asdourian v. Araj*, 38 Cal. 3d 276, 283, 696 P.2d 95, 99, 211 Cal. Rptr. 703, 706-07 (1985) (stating that the doctrine of "substantial compliance" may be used to avoid the harsh consequences of California Business and Professions Code § 7031); *id.* at 284, 696 P.2d at 100, 211 Cal. Rptr. at 708 (stating that the test to determine if the contractor has substantially complied with the license law is whether the contractor's substantial compliance comports with the policy of the statute); *Wilson v. Steele*, 211 Cal. App. 3d 1053, 1062, 259 Cal. Rptr. 851, 856 (1989) (holding that a contract entered into by an unlicensed contractor is illegal and void); *Shields v. Shoaff*, 116 Cal. App. 2d 306, 309, 253 P.2d 1002, 1004 (1953) (stating that before plaintiff could recover, plaintiff must allege and prove that the contractor had a valid contractor's license while performing the contract). But see *Domach v. Spencer*, 101 Cal. App. 3d 308, 311-12, 161 Cal. Rptr. 459, 461 (1980) (specifying that, although an unlicensed contractor cannot bring an action on a building contract, a member of the public is not barred from bringing or maintaining a contract suit by California

requires that, if licensure is controverted, then proof of licensure must be established by production of a certificate issued by the Contractor's State License Board ("Board").⁵ Under Chapter 797, since the burden of proof to establish licensure is on the licensee, the person controverting licensure does not have to produce the certificate issued by the Board.⁶

RMC

Business Associations and Professions; dentistry

Business and Professions Code §§ 1618.5, 1685 (new); Health and Safety Code § 1380 (amended).
AB 502 (Moore); 1993 STAT. Ch. 464

Under existing law, the Board of Dental Examiners of California (Board)¹ is authorized to revoke or suspend the license of a dentist² for unprofessional conduct.³ Under existing law, unprofessional conduct consists of, but is not limited to, excessive prescribing of drugs, treatment, or diagnostic procedures.⁴ Under Chapter 464, when a person⁵ licensed

Business and Professions Code § 7031).

5. CAL. BUS. & PROF. CODE § 7031(c) (amended by Chapter 797); *see id.* § 7000.5 (West Supp. 1993) (stating that the Board consists of 13 members appointed by the Governor).

6. *Id.* § 7031(c) (amended by Chapter 797).

1. *See* CAL. BUS. & PROF. CODE § 1601 (West 1990) (describing the Dental Board of Examiners as consisting of eight practicing dentists, one registered dental hygienist, one registered dental assistant, and four public members, and indicating that the Board is responsible for examinations and rules enforcement).

2. *See id.* §§ 1625 (West 1990) (defining the profession of dentistry).

3. *Id.* § 1670 (West 1990); *see id.* (stating, that in addition to unprofessional conduct, licentiates may have their licenses revoked or suspended for incompetence, gross negligence, or repeated acts of negligence in their profession); *id.* § 1680(p) (West Supp. 1990) (stating that any dentist who excessively prescribes or administers treatment, or diagnostic procedures, as determined by the customary practices of the dental profession, is guilty of a misdemeanor); *see also id.* § 1701(f) (West 1990) (specifying that it is a misdemeanor for a dentist to practice dentistry either without a license or with a revoked or suspended license); CAL. HEALTH & SAFETY CODE § 1386(a)-(b) (West 1990) (establishing grounds for the revocation of a health practitioner's professional license); CAL. PENAL CODE § 17(b) (West Supp. 1988) (defining misdemeanor). *See generally Utah Suspends Licenses of Twin-Brother Dentists*, ORLANDO SENTINEL TRIB., Oct. 22, 1992, at A20 (reporting on the suspension of two dentists' licenses for unprofessional conduct consisting of several instances of overprescribing narcotics to patients and engaging in outdated or shoddy dentistry).

4. CAL. BUS. & PROF. CODE §§ 1680(a)-(ee) (West Supp. 1993), 1681(a)-(c) (West 1990); *see James v. Board of Dental Examiners*, 172 Cal. App. 3d 1096, 1107, 218 Cal. Rptr. 710, 717 (1985) (noting that incompetence, gross inefficiency, and negligence are not acts constituting unprofessional conduct).

5. *See* CAL. BUS. & PROF. CODE § 7512.3 (West Supp. 1993) (defining person to include any individual, firm, company, association, organization, partnership, or corporation).

under the Dental Practices Act, either directly or through office policy, discourages necessary treatment or permits excessive, incompetent,⁶ grossly negligent,⁷ unnecessary treatment, or repeated negligent acts,⁸ that person also commits unprofessional conduct.⁹

Under existing law the Department of Corporations must conduct periodic on-site medical surveys¹⁰ of the health care delivery service of each health care service plan (Plan).¹¹ Existing law provides that information obtained regarding the quality of care discovered by on-site surveys is open to the public, except these deficiencies which are corrected within thirty days of the date the Plan was notified.¹² Under Chapter 464, the Board must provide the Department of Corporations' Commissioner¹³ with a copy of any accusation against dental providers of the Plan and inform the Commissioner of any survey, deficiency, and correction plan

6. See *James*, 172 Cal. App. 3d at 1109, 218 Cal. Rptr. at 718 (defining incompetence as a lack of knowledge or ability in the discharging of professional obligations resulting from a correctable fault or defect).

7. See *Yellen v. Board of Medical Quality Assurance*, 174 Cal. App. 3d 1040, 1058, 220 Cal. Rptr. 426, 435 (1985) (describing gross negligence as an extreme departure from the standard of medical care).

8. But see *James* 172 Cal. App. 3d at 1109, 218 Cal. Rptr. at 718 (stating that two acts of simple negligence probably do not, by themselves, support any disciplinary action beyond, perhaps, probation).

9. CAL. BUS. & PROF. CODE § 1685 (enacted by Chapter 464); see *id.* (specifying that the standard of practice in the community is to be applied to determine excessive, unnecessary, incompetent, or grossly negligent treatment or repeated negligent acts); ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 502, at 4 (Apr. 20, 1993) (emphasizing the need to ensure quality medical care in offices where more than one dentist practices by requiring that the dentist in an office who establishes treatment policy be responsible for the quality of care in the office); cf. *Camacho v. Youde*, 95 Cal. App. 3d 161, 164, 157 Cal. Rptr. 26, 27 (1979) (disciplining a non-negligent licensed employer for the unlawful conduct of his employees even though he had no knowledge of the conduct); *Arenstein v. Board of Pharmacy*, 265 Cal. App. 2d 179, 192-93, 71 Cal. Rptr. 357, 365 (1968) (finding that a corporate pharmacy could be disciplined for the illegal acts of its employee-pharmacists even if it did not authorize or have knowledge of such activity); *Randle v. Board of Pharmacy*, 240 Cal. App. 2d 254, 261, 49 Cal. Rptr. 485, 489 (1966) (finding that a wife could be disciplined for the acts of her pharmacist husband where both were employed at the pharmacy owned by the wife). But see *Yale v. State Bar*, 16 Cal. 2d 175, 176, 105 P.2d 112, 113 (1940) (holding that an attorney is not subject to discipline for the acts of his partner in which he did not participate); *In re Luce*, 83 Cal. 303, 305, 23 P. 350, 351 (1890) (holding that an attorney is not subject to disbarment for the acts of a partner); *James*, 172 Cal. App. 3d at 1110, 218 Cal. Rptr. at 719 (holding an employer dentist not liable for the acts of his employee dentists of which he did not have any knowledge and stating that any unprofessional conduct should be based on a dentist's own acts or omissions).

10. See CAL. HEALTH & SAFETY CODE § 1380(a)-(i) (amended by Chapter 464) (outlining the requirements of the medical surveys to include a review of the procedures for obtaining health services, the procedures for regulating utilization, peer review mechanisms, internal procedures for assuring quality of care, and the overall performance of the plan in providing health care).

11. See *id.* § 1279 (West 1990) (requiring periodic inspections of licensed health facilities and requiring such an inspection at least once every two years); *id.* § 1380(b)-(j) (amended by Chapter 464) (specifying the procedures governing the conduct of officials during the medical surveys); *id.* § 1367(a)-(i) (West 1990) (listing the requirements which health care plans must meet).

12. *Id.* § 1380(h) (amended by Chapter 464).

13. See CAL. CORP. CODE § 25600 (West Supp. 1990) (establishing within the state government the chief officer of the Department of Corporations as the Commissioner of Corporations).

regarding dental providers.¹⁴ In addition, under Chapter 464, the Commissioner must provide the Board with a copy of any information regarding the quality of care of dental providers.¹⁵

JSE

Business Associations and Professions; health care referrals

Business and Professions Code §§ 650.01, 650.02 (new).
AB 919 (Speier); 1993 STAT. Ch. 1237

Existing law prohibits licensees¹ from receiving compensation² for the referral of patients to any entity.³ Existing law permits such professionals

14. CAL. BUS. & PROF. CODE § 1618.5(a) (enacted by Chapter 464); *see* *Rittenhouse v. Superior Court*, 235 Cal. App. 3d 1584, 1590, 1 Cal. Rptr. 2d 595, 598, (1991) (stating the general rule that communications between a doctor and patient are privileged and protected regardless of their relevancy to issues in litigation or a private or public interest); *Olympic Club v. Superior Court*, 229 Cal. App. 3d 358, 364, 282 Cal. Rptr. 1, 4 (1991) (concluding that disclosure of the reasons for rejecting member applicants is appropriate if the rejected members are first informed so that they can apply to the court to have their identities protected from disclosure); *Housing Authority v. Van de Kamp*, 223 Cal. App. 3d 109, 116, 272 Cal. Rptr. 584, 589 (1990) (noting two exceptions to the general rule of nondisclosure of a criminal record to include the contexts of employment or occupational certification, but that tenant eligibility does not constitute certification); *Denari v. Superior Court*, 215 Cal. App. 3d 1488, 1496, 264 Cal. Rptr. 261, 264 (1989) (balancing the fundamental right of privacy with a compelling public need in the circumstance where a defendant claims privileged information, by considering the importance or primacy of evidence to the plaintiff's case); *Mendez v. Superior Court*, 206 Cal. App. 3d 557, 579, 253 Cal. Rptr. 731, 744 (1988) (finding that there was no practical necessity for the defendant's discovery of the plaintiff's sexual history); *Board of Trustees v. Superior Court*, 119 Cal. App. 3d 516, 526, 174 Cal. Rptr. 160, 165 (1981) (noting that where the balancing test weighs in favor of disclosure of information the scope of disclosure should be narrow and specific).

15. CAL. HEALTH & SAFETY CODE § 1380(i) (amended by Chapter 464).

1. *See* CAL. BUS. & PROF. CODE § 650 (West Supp. 1993) (stating that this section applies to any person licensed under division two of the Business and Profession Code); *id.* §§ 500-4990 (West 1990 & Supp. 1993) (encompassing the regulation of the professionals within the healing arts by the Business and Professions Code).

2. *See id.* § 650 (West Supp. 1993) (including rebate, refund, commission, preference, patronage dividend, discount, or other consideration as compensation for referring patients).

3. *Id.*; *see id.* (West Supp. 1993) (making violation of this prohibition a public offense punishable by a maximum of one year imprisonment in the county jail or state prison, or a maximum fine of \$10,000, or both); *Mason v. Hosta*, 152 Cal. App. 3d 980, 986, 199 Cal. Rptr. 859, 862 (1984) (holding that under Business and Professions Code § 650, only one of the parties in a referral transaction need be a licensee in the healing arts for the referral to be illegal); *Mast v. State Board of Optometry*, 139 Cal. App. 2d 78, 93, 293 P.2d 148, 157 (1956) (finding that the revoking of an optometrist's license by the State Board of Optometry was not an abuse of the Board's discretion for the optometrist's violation of Business and Professions Code § 650); B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 461 (9th. ed. 1991) (stating that a contract can be considered illegal if it is contrary to an express statute); *cf.* CAL. BUS. & PROF. CODE § 650.2(a)-(h) (West Supp. 1993) (specifying the types of referrals that are allowed).

to refer patients to any laboratory, pharmacy, clinic, or health care facility⁴ if the professional has a proprietary interest⁵ in, or is a co-owner of, the facility, as long as the interest in the facility is based upon the amount of the proportional ownership of the licensee, and not based on the volume of patients referred.⁶

Chapter 1237 makes it a misdemeanor⁷ for a physician to refer a person to specified health care facilities⁸ if the physician has a financial interest with the person or entity that receives the referral.⁹ Chapter 1237

4. See CAL. BUS. & PROF. CODE § 650 (West Supp. 1993) (defining health care facility as a general acute care hospital, acute psychiatric hospital, skilled nursing facility, intermediate care facility, and any other health facility licensed by the State Department of Health Services).

5. See *id.* § 650.01(b)(2) (enacted by Chapter 1237) (defining financial interest).

6. *Id.* § 650 (West Supp. 1993); see *Beck v. American Health Group Int'l, Inc.*, 211 Cal. App. 3d 1555, 1565, 260 Cal. Rptr. 237, 243 (1989) (holding that a contract for a psychiatrist to act as the medical director for mental health services of a hospital linking his compensation to the number of psychiatric inpatients of the facility was unenforceable because of illegality where it violated Business and Professions Code § 650); 73 Op. Cal. Att'y Gen. 321, 323-24 (1990) (concluding that where a group of radiologists contracted with physicians to provide imaging services for the patients of the physicians, and the agreement provides that the group will charge each patient a fee for the services, and that the fees collected will be transmitted to the physicians, the physicians would pay stipulated amounts to the group for the services, and the total amounts paid by the physicians would be independent of, but increase proportionately less, than the total fees collected from the patients, would violate section 650 of the Business and Professions Code); *cf.* 42 U.S.C. § 1395nn (1990) (prohibiting a physician from making a referral to a specified entity if the physician or a family member has a financial interest in that entity).

7. See CAL. BUS. & PROF. CODE § 650.01(f) (enacted by Chapter 1237); see CAL. PENAL CODE § 17 (West Supp. 1993) (defining misdemeanor).

8. See CAL. BUS. & PROF. CODE § 650.01(a) (enacted by Chapter 1237) (including specified health care facilities those provide laboratory, diagnostic nuclear medicine, radiation oncology, physical therapy, physical rehabilitation, psychometric testing, home infusion therapy, or diagnostic imaging goods or services).

9. *Id.* § 650.01 (enacted by Chapter 1237); see *id.* § 650.01 (d)-(e) (enacted by Chapter 1237) (protecting payers from having to pay for charges resulting from violations of the referral prohibition); *id.* § 650.01(g) (enacted by Chapter 1237) (mandating that the Medical Board of California review any cases where there is a violation of California Business and Professions Code § 650.01, and giving the Medical Board discretion to take disciplinary action if the licensee has committed unprofessional conduct); *id.* § 650.02(a)-(i) (enacted by Chapter 1237) (listing exceptions based on public policy to the prohibition of patient referrals); see also ASSEMBLY FLOOR ANALYSIS OF AB 919, at 2 (June 1, 1993) (stating that this act is in response to studies contending that physicians who have ownership interest in health facilities have a financial incentive to refer their patients to those facilities resulting in higher health care costs and that these physicians refer at a higher rate); *cf.* FLA. STAT. ANN. § 455.236(4)(a) (West Supp. 1993) (prohibiting patient referrals by a health care provider where the provider has an investment interest because of a conflict of interest); *Companies Announce Health Care Merger*, ST. PETERSBURG TIMES, June 11, 1993, at B6D (reporting on Columbia's major effort to block the Florida State Legislature from passing an act banning patient referrals by physicians who have an interest in their hospital); *Managed Care Proponents Urge Limit on Self-Referral Ban in Budget Bill*, PENSION RPTR., June 21, 1993, at 1336 (reporting on the recent controversy over a bill in Congress that would ban patient referrals, stating that opponents believe that it will adversely effect the cost effectiveness of managed health care plans); David Burda, *Looking at Bans in a Different Light*, MODERN HEALTHCARE, May 31, 1993, at 25 (arguing how the ban on patient referrals is related to free market principals as much or more than protection of patient interest or cost containment).

also prohibits physicians and surgeons from entering into any cross-referral arrangement.¹⁰

JSE

Business Associations and Professions; highways—outdoor advertising

Business and Professions Code §§ 5207, 5325 (repealed); §§ 5216.3, 5216.4, 5222.1, 5440.1, 5442.5 (new); §§ 5203, 5272, 5442 (amended).

AB 881 (McDonald); 1993 STAT. Ch. 991

Existing law regulates the placement and type of outdoor advertising structures¹ which are visible from interstate highways.² Under Chapter 991, advertising structure is now defined to include the sides of buildings which are painted for use as an outdoor advertising displays.³ Chapter 991 prohibits outdoor advertising on designated scenic highways⁴ with

10. CAL. BUS. & PROF. CODE § 650.01(c) (enacted by Chapter 1237); cf. FLA. STAT. ANN. § 455.236(4)(f) (West Supp. 1993) (prohibiting cross-referral arrangements); MD. HEALTH OCC. CODE ANN. § 1-302(c) (Supp. 1993) (prohibiting cross-referral arrangements).

1. See CAL. BUS. & PROF. CODE § 5203 (amended by Chapter 991) (defining advertising structure as a structure of any kind which is used or maintained for outdoor advertising purposes).

2. *Id.* § 5350 (West 1992); see *id.* § 5405 (West 1992) (mandating that outdoor advertising displays be located at least 660 feet from the public right-of-way); see also 23 U.S.C. § 131 (1992) (setting out the guidelines for the federal Highway Beautification Act and exacting compliance with its provisions by state governments); CAL. BUS. & PROF. CODE § 5403 (West 1992) (discussing size and location limitations for billboards); *id.* § 5405 (West 1992) (stating that all regulations on advertising structures be made in accordance with the federal Highway Beautification Act); *United Outdoor Advertising Co. v. Business Transp. & Hous. Agency*, 44 Cal. 3d 242, 245, 746 P.2d 877, 880, 242 Cal. Rptr. 738, 741 (1988) (stating that the California Legislature responded to the Highway Beautification Act by promulgating the Outdoor Advertising Act within the Business and Professions Code); *Metromedia v. San Diego*, 453 U.S. 490, 515 (holding that a content neutral billboard reduction ordinance would be constitutionally sound). The Court in *Metromedia* stated that it would not address the constitutionality of the Highway Beautification Act. *Id.*

3. CAL. BUS. & PROF. CODE § 5203 (amended by Chapter 991); see *id.* (referring to advertising structure as not only a structure erected for advertising purposes, but also a structure which is simply used for advertising purposes). See generally *Dean W. Knight & Sons, Inc. v. California Dep't of Transp.*, 155 Cal. App. 3d 300, 202 Cal. Rptr. 44 (1984) (discussing the prior statutory definition of advertising structure).

4. See CAL. BUS. & PROF. CODE § 5216.4(A) (enacted by Chapter 991) (defining a scenic highway or byway as a state highway which is officially designated as scenic pursuant to §§ 260, 261, 262, and 262.5 of the Streets and Highways Code); see also CAL. STS. & HIGH. CODE § 261 (West Supp. 1993) (stating the general provisions for labeling a highway as scenic); *id.* § 262 (West Supp. 1993) (discussing labeling procedures and map designations for scenic highways).

exceptions for certain types of displays including directional or official signs, those advertising the sale of real property, and those determined to be of historic or artistic significance.⁵

ELG

Business Associations and Professions; interim orders of suspension of licenses

Business and Professions Code § 494 (new).
SB 842 (Presley); 1993 STAT. Ch. 840

Existing law provides that any board¹ of the Department of Consumer Affairs (DCA)² may establish regulations and procedures governing the discipline of licentiates,³ including license⁴ suspension, revocation,

5. CAL. BUS. & PROF. CODE § 5440.1 (enacted by Chapter 991); *see id.* (prohibiting the placement or maintenance of an advertising structure along an officially designated scenic highway); *id.* § 5442.5 (enacted by Chapter 991) (exempting the following signs from the general prohibition on the placement of signs: (1) Directional and official signs; (2) signs advertising the sale of property on which they are located; (3) signs advertising activities conducted on the property which they are located; (4) signs in existence on October 22, 1965 which have been determined to be landmark signs or signs of historical or artistic significance; and (5) signs advertising distribution of free coffee to interstate travelers by non profit organizations); *see also* 23 U.S.C. § 131(s) (1992) (prohibiting the placement of signs along state designated scenic highways or byways); *Metromedia*, 453 U.S. at 515 (holding that outdoor advertising displays can be regulated or prohibited as long as there is a strong state interest, the restriction is narrowly drawn to serve that interest and the restriction does not favor one type of speech over another); *People v. Ad Way Signs*, 14 Cal. App. 4th 187, 190, 17 Cal. Rptr. 2d 446, 449 (1993) (recognizing a state interest in promoting the scenic beauty of state highways).

1. *See* CAL. BUS. & PROF. CODE § 477(a) (West Supp. 1993) (defining board to include a bureau, commission, committee, department, division, examining committee, or agency); *see also id.* § 101 (West Supp. 1993) (listing the boards constituting the Department of Consumer Affairs); *id.* § 494(m) (enacted by Chapter 842) (including in the definition of the term board, an allied health agency within the jurisdiction of the Medical Board of California, the Osteopathic Medical Board of California, and the State Board of Chiropractic examiners).

2. *See id.* § 310(a)-(j) (West 1990) (listing the powers and duties of the director of the DCA including, but not limited to, promoting ethical standards of professional conduct in order to protect consumers); *see also id.* § 300-337 (West Supp. 1993) (providing the detailed provisions of the Consumer Affairs Act); *id.* § 302(c) (West 1990) (defining consumer as an individual who seeks, purchases, or leases goods, services, money, or credit for personal, family, or household purposes).

3. *See id.* § 23.8 (West 1990) (defining licentiate as any person authorized by license, certificate, or regulation to engage in a profession regulated under the California Business and Professions Code §§ 1000-3600).

4. *See id.* § 477(b) (West Supp. 1990) (defining license as any certification to engage in a business or profession governed by the California Business and Professions Code).

probation, and the imposition of conditions or restrictions.⁵ Under existing law, the Medical Board of California,⁶ State Athletic Commission,⁷ and the Board of Podiatric Medicine⁸ are three licensing agencies in the DCA which have the authority to suspend licenses on an interim basis.⁹ Chapter 840 extends this license suspension authority to all licensing boards constituting the DCA.¹⁰

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5. *Id.* § 475-495 (West 1990); *see id.* § 475(c) (West Supp. 1993) (disallowing a board to suspend or revoke a license only on the basis of lack of good character or any similar ground relating to an applicant's character, reputation, personality, or habits); *id.* § 2337 (West Supp. 1993) (establishing a priority to decisions on revocation or suspension in Superior Court over all other civil actions); *see also* Arneson v. Fox, 28 Cal. 3d 440, 443, 621 P.2d 817, 818, 170 Cal. Rptr. 778, 779 (1980) (concluding a felony conviction following a plea of nolo contendere may serve as the basis for administrative discipline so long as the underlying offense bears a substantial relationship to the qualifications, functions, or duties of the licensed business or profession); Cartwright v. Board of Chiropractic Examiners, 16 Cal. 3d 762, 766-67, 548 P.2d 1134, 1137-38, 129 Cal. Rptr. 462, 465-66 (1976) (holding that, in order to warrant a suspension or revocation of license based on moral turpitude because of a conviction, the conviction must demonstrate the unfitness of the individual to practice that profession); Thorpe v. Board of Examiners in Veterinary Medicine, 104 Cal. App. 3d 111, 116, 163 Cal. Rptr. 382, 385, (1980) (holding that a veterinarian's conviction of a drug crime was sufficient moral turpitude to affect his functioning in his profession and could warrant a suspension or revocation of his license).

6. *See* CAL. BUS. & PROF. CODE § 2001 (West 1990) (establishing the Medical Board of California); *see also* Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 73, 435 P.2d 553, 558, 64 Cal. Rptr. 785, 790 (1968) (stating that the purpose of an action seeking revocation of a doctor's certificate is not to punish the doctor but rather to protect the public).

7. *See* CAL. BUS. & PROF. CODE § 18602-18888 (West 1987) (establishing the State Athletic Commission within the Department of Consumer Affairs).

8. *See id.* § 2460 (West 1990) (establishing the Board of Podiatric Medicine).

9. *Id.* § 18842 (West Supp. 1993); CAL. GOV'T CODE § 11529(a) (West 1992); *see* CAL. BUS. & PROF. CODE § 2230 (West Supp. 1993) (designating that hearings on revocation or suspension of professional licenses by the Medical Board must conform to the Government Code §§ 11371-11500); *id.* § 2319(a)-(b) (West Supp. 1993) (limiting the period for completion of investigation for complex medical cases or fraud to no more than one year and establishing a goal for all other types of cases to six months from the date of a complaint received); CAL. GOV'T CODE §§ 11371-11373.3 (West 1992) (setting forth the procedure for disciplinary hearings by the Medical Board of California and the Board of Podiatric Medicine); *id.* § 11372(a)-(b) (West 1992) (governing disciplinary hearings for the Medical Board of California); *id.* § 11529 (West 1992) (permitting interim orders where a disciplinary hearing will be conducted by the Medical Board of California and the Podiatric Medicine, and where affidavits in support of the petition show that the licensee has engaged in, or is about to engage in, acts or omissions in violation of the Medical Practices Act); *see also* CAL. BUS. & PROF. CODE §§ 2000-2528 (West Supp. 1988) (establishing The Medical Practices Act); *cf.* Koelling v. Board of Trustees, 146 N.W.2d 284, 289 (Iowa 1966) (holding that it was a constitutional delegation of power to permit a state board to indefinitely suspend a doctor's staff privileges pending resolution of criminal proceedings against him). *See generally* James A. Cathcart & Gill Graff, *Occupational Licensing: Factoring it Out*, 9 PAC. L.J. 147, 147-53 (1978) (discussing the fact that states' licensing statutes are subject to judicial review under the Due Process Clause of the Fourteenth Amendment).

10. CAL. BUS. & PROF. CODE 494(a)-(m) (enacted by Chapter 842); *see id.* § 101(a)-(g) (West 1990) (listing all the boards constituting the DCA); *see also* CALIFORNIA COMMITTEE ON PUBLIC AFFAIRS, COMMITTEE ANALYSIS OF SB 842, at 4 (May 6, 1993) (stating that Chapter 840 merely aligns the disciplinary powers of all licensing agencies under the DCA in terms of interim orders).

Business Associations and Professions; mergers—corporations

Corporations Code §§ 161.5, 165.5, 167.5, 171.05, 171.5, 190.5, 1113 (new); §§ 161, 190, 1101.1, 1109, 1201, 1300, 15611, 15636, 15642, 15678.1, 15678.2, 15678.4, 15678.5 15678.6, 15678.7, 15678.8, 15681 (amended); Government Code §§ 12202, 12214 (amended).

AB 2063 (Weggeland) 1993 STAT. Ch. 543

Under the existing California Revised Limited Partnership Act,¹ a limited partnership² may merge with another limited partnership, or other business entity.³ Under the existing California General Corporation Law, a corporation⁴ may only merge with other corporations.⁵

Chapter 543 amends the California General Corporation Law by allowing a corporation to merge with limited partnerships as well as other

1. See CAL. CORP. CODE §§ 15611-15723 (West 1991 & Supp. 1993) (setting forth the provisions of the California Revised Limited Partnership Act).

2. See *id.* § 171.5 (enacted by Chapter 543) (defining limited partnership as a partnership formed by two or more persons and having one or more general partners and one or more limited partners, or their equivalents under any name).

3. *Id.* § 15678.1(a)-(c) (amended by Chapter 543); see *id.* § 15006(1) (West 1991) (defining partnership as an association of two or more persons carrying on as co-owners, a business for profit); *id.* § 15611(s) (West Supp. 1993) (defining other business entities to include a corporation, general partnership, business trust, real estate investment trust, or an unincorporated association, but excluding a limited partnership); *id.* § 15678.1(b) (amended by Chapter 543) (providing that existing law does not require that the surviving entity be a limited partnership); cf. DEL. CODE ANN. tit. 3, §§ 17-101 through 17-1109 (1992); MASS. GEN. LAWS ANN. ch. 109, §§ 1-62 (West 1990); N.Y. PARTNERSHIP LAW §§ 121-101 through 121-1300 (McKinney Supp. 1993) (setting forth the provisions of the Revised Limited Partnership Act for each respective state). See generally Deborah A. Demott, *Rollups of Limited Partnerships: Questions of Regulation and Fairness*, 70 WASH. U. L.Q. 617, 617-37 (1992) (discussing limited partnership mergers and combinations).

4. See CAL. CORP. CODE § 162 (West 1990) (defining corporation); see *City of Santa Monica v. County of Los Angeles*, 4 Cal. App. 4th 1142, 1144, 6 Cal. Rptr. 2d 237, 241 (1992) (finding that a municipal corporation is not a corporation against which a suit may be brought per statutory construction).

5. CAL. CORP. CODE § 1100 (West 1990). See generally *Review of Selected 1990 Legislation*, 22 PAC. L.J. 426 (1991) (discussing requirements for mergers of parent companies with subsidiaries).

corporations.⁶ In addition, Chapter 543 specifies that the merged entity created may be either a limited partnership or a corporation.⁷

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Business Associations and Professions; nonprofit directors' liability

Corporations Code § 5239 (amended)
AB 2025 (Bowen); 1993 STAT. Ch. 634

Existing law exempts a volunteer¹ director² or executive officer³ of a nonprofit public benefit corporation⁴ from personal liability for monetary damages⁵ caused by the director's or officer's negligent⁶ act or omission in the performance of the director's or officer's duties,⁷ if certain

6. CAL. CORP. CODE § 1113 (enacted by Chapter 543); cf. ALA. CODE § 10-9A-191(a) (1993) (providing for the merger of a domestic limited partnership with other business entities); DEL. CODE ANN. tit. 8, § 263 (1991) (allowing the merger of Delaware corporations with limited partnerships); GA. CODE ANN. § 14-2-1109(b) (Michie Supp. 1993) (allowing the merger of a corporation with a limited partnership, except if the limited partnership was formed under the laws of a state which forbids a merger with a corporation); 15 PA. CONS. STAT. ANN. § 1921(c) (1993) (allowing business corporations to merge with general or limited partnerships); TEX. REV. CIV. STAT. ANN. art. 6132a-1, § 2.11(h) (Vernon 1993) (permitting the merger of corporations with limited partnerships); WASH. REV. CODE ANN. § 23B.11.080(1) (West Supp. 1993) (permitting the merger of a corporation with a limited partnership).

7. CAL. CORP. CODE § 1113(a) (enacted by Chapter 543).

1. See CAL. CORP. CODE § 5239(b) (amended by Chapter 634) (defining volunteer as one who renders services without compensation); see also *id.* (defining compensation as salary, fee, or other remuneration for services rendered, but excluding reimbursement for expenses).

2. See *id.* § 5047 (West 1990) (defining director of a nonprofit corporation).

3. See *id.* § 5239(c) (amended by Chapter 634) (defining executive officer of a nonprofit public benefit corporation).

4. See *id.* §§ 5110-6910 (West 1990 & Supp. 1993) (describing the structure, powers, and duties of a nonprofit public benefit corporation).

5. See Thomas Silk, *Annual Survey of Federal Tax Law and California Legislation Affecting Nonprofit Organizations: 1987*, 22 U.S.F. L. REV. 713, 732 (1988) (explaining that California Civil Code § 5239 addresses immunity from monetary damages, but not immunity from damages in equity, such as injunctions or restitution).

6. See CAL. CIV. CODE § 1714 (West Supp. 1993) (stating that every individual is responsible for the results of both his or her wilful acts, and for injuries caused by the want of care or ordinary skill); CAL. PENAL CODE § 7 (West 1988) (defining negligence); BAJI No. 3.10 (7th ed. 1986) (defining negligence as the failure to use the care which persons of ordinary prudence would use in order to avoid injury to themselves or others).

7. See CAL. CORP. CODE § 5047.5(a) (West Supp. 1993) (stating the legislative finding that volunteer directors and officers of nonprofit corporations are critical to the operation of charitable affairs, and should not be deterred by the fear of exposure of their personal assets as a result of their activities as volunteers); *id.* § 5231 (West 1990) (exempting a director of a public benefit corporation from liability when that director reasonably relies, in good faith, on information provided by the corporation's officers, counsel, accountants, or committees of the board); see also *Christensen v. Superior Court*, 54 Cal. 3d 868, 885, 820 P.2d 181, 189, 2 Cal. Rptr. 2d

conditions are met.⁸ One such condition is that all reasonable efforts have been made in good faith⁹ to obtain liability insurance.¹⁰

79, 87 (1992) (holding that exceptions to the general principle of liability for negligence are permitted only when there is clear public policy support). *But see* CAL. CORP. CODE § 5230(a) (West 1990) (providing that the duties and liabilities of a director of a nonprofit public benefit corporation must apply regardless of whether the director receives compensation from the corporation); *Frances T. v. Village Green Owners Ass'n*, 42 Cal. 3d 490, 504 n.11, 723 P.2d 573, 580 n.11, 229 Cal. Rptr. 456, 463 n.11 (1986) (affirming that the absence of compensation does not relieve directors of a nonprofit mutual benefit corporation from liability for breach of a duty of care); Silk, *supra* note 5, at 732-33 (asserting that nothing in California Civil Code § 5239 prevents the nonprofit corporation from suing its own board members for damages, and, thus, the legislative intent of protecting individual directors may be thwarted when the corporation seeks damages from a director for breach of ordinary care in exposing the corporation to the claims of third parties).

8. CAL. CORP. CODE § 5239(a)(1)-(4) (amended by Chapter 634); *see id.* (exempting volunteer directors or volunteer executive officers from liability if: (1) The act or omission was within the scope of their duties; (2) the act or omission was performed in good faith; (3) the act or omission was not reckless, wanton, intentional or grossly negligent; and (4) the damages are covered by a policy of liability insurance or reasonable efforts had been made to obtain liability insurance). The liability of the corporation itself for damages caused by the volunteer director or executive officer is not limited. *Id.* § 5239(d) (amended by Chapter 634). Neither is the personal liability of the volunteer director or executive officer limited in instances of self-dealing, prohibited loans or distributions, or in any action brought by the Attorney General. *Id.* § 5239(e)(1)-(2) (amended by Chapter 634); *see also id.* § 5047.5(e) (West Supp. 1993) (exempting the uncompensated directors of nonprofit corporations from liability for certain acts or omissions only if the corporation maintains general liability insurance in specified amounts); *id.* § 5223(b) (West 1990) (permitting the Attorney General to intervene in an action for removal of a director); *id.* § 5225(d) (West 1990) (permitting the Attorney General to appoint a provisional director); *id.* § 5233(a) (West 1990) (defining self-dealing transactions); *id.* § 5237 (West 1990) (defining prohibited loans and distributions); *id.* § 5250 (West 1990) (permitting the Attorney General to institute proceedings to compel compliance with trusts); *cf. id.* § 9247(a)(1)-(4) (West 1991) (exempting volunteer directors and officers of nonprofit religious corporations from liability for certain acts and omissions if the corporation maintains liability insurance or has made reasonable efforts to obtain liability insurance); *id.* § 24001.5(b), (e)(1)-(2) (West Supp. 1993) (exempting volunteer directors and officers of nonprofit medical associations from liability under certain conditions, if the association maintains general liability insurance). *See generally* Charles Robert Tremper, *Compensation for Harm from Charitable Activity*, 76 CORNELL L. REV. 401 (1991) (discussing the impact of tort liability on charities, and considering alternative solutions to the problems which arise when liability is imposed on charitable volunteers).

9. *See* CAL. COM. CODE § 1201(19) (West Supp. 1993) (defining good faith as honesty in fact).

10. CAL. CORP. CODE § 5239(a)(4) (amended by Chapter 634); *see id.* § 5231(a) (West 1990) (requiring directors of public benefit corporations to perform their duties in good faith); CAL. INS. CODE § 108 (West Supp. 1993) (describing liability insurance); *Raven's Cove Townhomes, Inc. v. Knappe Dev. Co.*, 114 Cal. App. 3d 783, 800-801, 171 Cal. Rptr. 334, 344 (1983) (holding that directors and officers of a homeowner's association breached their fiduciary duty by failing to assess an adequate reserve fund for maintenance and repairs); Silk, *supra* note 5, at 731-32 (explaining that the language of California Civil Code § 5239(a)(4) requires that directors who can personally afford to obtain liability insurance, must do so in order to benefit from the immunity afforded by the statute, regardless of the inability of the organization to obtain insurance); *cf. KAN. STAT. ANN.* § 60-3601(b)-(c) (1992) (exempting volunteers of nonprofit organizations, as defined by Internal Revenue Code § 501(c)(3), from liability for damages if the organization carries general liability insurance coverage); MD. CODE ANN., CTS. & JUD. PROC. § 5-312(b) (1992) (exempting agents of specified charitable, community and nonprofit organizations from personal liability for damages in any suit if the organization maintains liability insurance coverage). *But see* Silk, *supra* note 5, at 731 (asserting that the unavailability of liability insurance for officers and directors and resultant exposure to personal liability is deterring many qualified people from service in nonprofit organizations).

Chapter 634 provides that, in the case of specified nonprofit public benefit corporations,¹¹ the requirement to use reasonable efforts to obtain liability insurance is satisfied if the corporation makes at least one inquiry per year to purchase liability insurance, and such insurance is not available at a cost below 5% of the corporation's annual budget for the previous year.¹²

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Business Associations and Professions; professional law corporations

Business and Professions Code § 6171 (new); §§ 6161, 6165, 6180.14 (amended); Corporations Code §§ 13401, 13404, 13406 (amended).

SB 312 (Petriss); 1993 STAT. Ch 955

Under existing law, a professional corporation¹ can be incorporated under the General Corporation Law.² Existing law requires law corporations to register annually with the State Bar Association.³ Existing

11. See CAL. CORP. CODE § 5239(h) (amended by Chapter 634) (specifying nonprofit public benefit corporations that are exempt from federal income taxation under Internal Revenue Code § 501(c)(3) and either have annual budgets of less than \$25,000 or whose first year budget does not exceed \$25,000).

12. *Id.*; see *id.* (requiring an inquiry into the cost of a policy with at least \$500,000 in coverage); see also *id.* § 6321 (West 1990) (listing the items which the annual report of a nonprofit public benefit corporation must contain, including assets, liabilities, revenues, and expenses).

1. See CAL. CORP. CODE § 13401(a),(b) (amended by Chapter 955) (defining a professional corporation as a business rendering professional services in a single profession); see also CAL. BUS. & PROF. CODE §§ 6000-6228 (West 1990 & Supp. 1993) (governing the professional services of attorneys).

2. CAL. CORP. CODE § 13401(b) (West Supp. 1993); see *id.* §§ 100-2319 (West 1990 & Supp. 1993) (setting forth the provisions of the General Corporation Code).

3. CAL. BUS. & PROF. CODE § 6161 (amended by Chapter 955); see *id.* (providing that the law corporation must supply all necessary and pertinent documents and information requested by the State Bar concerning the applicant's plan of operation including, but not limited to, a copy of its articles of incorporation; a copy of its bylaws; the name and address of the corporation; the names and addresses of its officers, directors, shareholders, and members; and any fictitious name or names which the corporation intends to use).

law also requires that the corporation's directors, officers, and shareholders be licensed to practice law in California.⁴

Chapter 955 expands existing law to allow a professional law corporation to be incorporated under the Nonprofit Public Benefit Corporation Law (NPBCL)⁵ if it: (1) Qualifies as a legal services project or qualified support center;⁶ or (2) meets all the requirements of, and complies with, the NPBCL, has only members and directors who are licensed to practice law in California, has a clientele of at least seventy percent lower income persons,⁷ and charges no client a contingency fee.⁸

Existing law also requires that law corporations maintain specified levels of malpractice insurance.⁹ Chapter 955 provides that, until January 1, 1996, professional law corporations that incorporate under the NPBCL do not need to maintain liability insurance if the directors of the corporation have made all reasonable efforts in good faith¹⁰ to obtain available liability insurance.¹¹

4. *Id.* § 6165 (amended by Chapter 955); *see* CAL. CORP. CODE § 13401(c) (West Supp. 1993) (defining a licensed person as any natural person who is duly licensed under the provisions of the Business and Professions Code to render the same professional services as are, or will be, rendered by the professional corporation of which that person is or intends to become an officer, director, shareholder, or employee); *see also* CAL. BUS. & PROF. CODE § 6046 (West 1990) (specifying that the powers of the California State Bar Association Examining Committee include the examination of all applicants for admission to practice law and the administration of requirements for admission).

5. CAL. BUS. & PROF. CODE §§ 5110-6910 (West 1990 & Supp. 1993) (setting forth the provisions of the Nonprofit Public Benefit Corporation Law).

6. CAL. CORP. CODE § 13406(b)(1) (amended by Chapter 955); *see* BUS. & PROF. CODE § 6213 (a),(b) (West 1990) (defining qualified legal services project and qualified support center as nonprofit businesses incorporated and operated exclusively in California providing, as their primary purpose and function, legal services without charge to indigent persons, and maintaining quality control procedures approved by the State Bar of California).

7. CAL. CORP. CODE § 13406(b)(1)(B) (amended by Chapter 955); *see* CAL. HEALTH & SAFETY CODE § 50079.5 (West 1986) (defining lower income persons).

8. CAL. CORP. CODE § 13406(b)(2)(D) (amended by Chapter 955); *see* CAL. BUS. & PROF. CODE § 6147 (West Supp. 1993) (outlining the requirements for entering into a contingency fee agreement and the procedures that the attorney must follow).

9. CAL. BUS. & PROF. CODE § 6171(b) (amended by Chapter 955).

10. *See* CAL. COM. CODE § 1201(19) (West Supp. 1993) (defining good faith as honesty in fact).

11. CAL. BUS. & PROF. CODE § 6171(b) (amended by Chapter 955); *see* CAL. CORP. CODE § 5239(h) (amended by Chapter 687) (requiring an inquiry into the cost of a policy with at least \$500,000 in coverage); *id.* (providing that, in the case of specified nonprofit public benefit corporations, the requirement to use reasonable efforts to obtain liability insurance is satisfied if the corporation makes at least one inquiry per year to purchase liability insurance, and such insurance is not available at a cost below five percent of the corporation's annual budget for the previous year); Thomas Silk, *Annual Survey of Federal Tax Law and California Legislation Affecting Nonprofit Organizations: 1987*, 22 U.S.F. L. REV. 713, 731-32 (1988) (explaining that the language of California Civil Code § 5239(a)(4) requires that directors, who can personally afford to obtain liability insurance, must do so in order to benefit from the immunity afforded by the statute, regardless of the inability of the organization to do so); *cf.* KAN. STAT. ANN. § 60-3601 (Supp. 1992) (exempting volunteers of nonprofit organizations, as defined by Internal Revenue Code § 501(c)(3), from liability for damages if the organization carries general liability insurance coverage); MD. CODE ANN., CTS. & JUD. PROC.

Chapter 955 also provides that the corporation may use a fictitious name.¹²

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Business Associations and Professions; real estate appraisers

Civil Code §§ 1086, 1087, 1088 (amended).
SB 914 (Leonard); 1993 STAT. Ch. 331

Business and Professions Code §§ 11324, 11340 (amended).
AB 387 (Boland); 1993 STAT. Ch. 941

Existing law requires the Director of the Office of Real Estate Appraisers (OREA)¹ to establish procedures and regulations enabling individuals to apply for a real estate appraiser's license and certificate.² Chapter 941 states that appraisal license and certificate requirements shall be deemed complete upon proof of a specified number of hours of experience.³

§ 5-312 (Supp. 1993) (exempting agents of specified charitable, community and nonprofit organizations from personal liability for damages in any suit if the organization maintains liability insurance coverage). *But see* Silk, *supra*, at 731 (asserting that the unavailability of liability insurance for officers and directors, and resultant exposure to personal liability, is deterring many qualified people from service in nonprofit organizations).

12. CAL. BUS. & PROF. CODE § 6171(c) (amended by Chapter 955).

1. See CAL. BUS. & PROF. CODE § 11301 (West Supp. 1993) (creating OREA within the Business, Transportation and Housing Agency, to administer and enforce The Real Estate Appraisers Licensing and Certification Law (REALCL)); see also 12 U.S.C. §§ 3331-3351 (1990) (enacting the Federal Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) of 1989, which requires all states to institute a licensing and certification program for persons who engage in federally related real estate appraisal activity).

2. CAL. BUS. & PROF. CODE § 11340(c) (amended by Chapter 941); see *id.* (stating that the regulations must at a minimum, include criteria for experience and education, or their equivalency, and must meet the requirements of the Appraisal Foundation); *id.* § 11302(c) (West Supp. 1993) (defining Appraisal Foundation); *c.f.* CONN. GEN. STAT. ANN. § 20-312 (West Supp. 1993); FLA. STAT. ANN. § 47.501 (West 1989); NEB. REV. STAT. § 81-8,280 (1987) (utilizing similar requirements for the certification of real estate appraisers). See generally *Review of Selected 1990 California Legislation*, 22 PAC. L.J. 323, 410-13 (1991) (reviewing the enactment of the Real Estate Licensing and Certification Law (REALCL)).

3. CAL. BUS. & PROF. CODE § 11340(b) (amended by Chapter 941); see *id.* (providing that a licensed real estate broker who has completed one thousand hours of experience in the valuation of real property shall be deemed to have completed the appraisal license application experience requirements).

Under existing law, agents⁴ are allowed access to a multiple listing service (MLS),⁵ and are responsible for all representations of which the agent knew or should have known were false or inaccurate.⁶ Chapter 331 adds that appraisers⁷ may also use a MLS, and are likewise responsible for the truth of their representations.⁸

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4. See CAL. CIV. CODE § 1086(d) (amended by Chapter 331) (defining agent as a person authorized to act in such a capacity, and licensed as a real estate broker under California Business & Professions Code § 10131); CAL. BUS. & PROF. CODE § 10131 (West 1987) (defining real estate broker as a person who in expectation of compensation, negotiates to sell, buy, lease, rent, or assist in the filing of an application for purchase of lands owned by the state or federal government, or solicits borrowers or lenders for loans); cf. 26 U.S.C. § 6045(c)(1) (1988) (stating that broker includes a dealer, a barter exchange, and any other person who for consideration regularly acts as a middleman with respect to property or services).

5. See CAL. CIV. CODE § 1087 (amended by Chapter 331); see *id.* (defining MLS as a cooperation of agents and appraisers, acting through an intermediary, through which agents establish express or implied relationships with respect to listed properties, or which may be used by agents and appraisers to prepare market evaluations and appraisals of real property).

6. *Id.* § 1088 (amended by Chapter 331); see *id.* (stating the agent's responsibility for the truth of the agent's representations); see also *id.* § 2079 (West Supp. 1993) (imposing a duty on real estate brokers to conduct a reasonably competent inspection and to disclose to the buyer all facts materially affecting the value of the property); *Smith v. Rickard*, 205 Cal. App. 3d 1354, 1360, 254 Cal. Rptr. 633, 636 (1988) (holding that the broker's duty to inspect and disclose only applies to brokers selling residential property); *Easton v. Strassburger*, 152 Cal. App. 3d 90, 102, 199 Cal. Rptr. 383, 390 (1984) (holding that a real estate broker representing the seller has an affirmative duty to conduct a reasonably competent inspection, and to disclose all material facts). See generally Harry D. Miller, *Professional Duty of Real Estate Brokers to Buyers*, NAT'L L.J., Nov. 25, 1985, at 15 (discussing duties owed by real estate agents in California); Stuart A. Knowles, Comment, *Real Estate Brokers Liability for Failure to Disclose: A New Duty to Investigate*, 17 PAC. L.J. 327 (1985) (discussing real estate brokers' expanded duty of disclosure).

7. See CAL. CIV. CODE § 1086(e) (amended by Chapter 331) (defining a real estate appraiser as one issued a license or certificate by OREA under California Business & Professions Code § 11302(n) to perform appraisals); see also CAL. BUS. & PROF. CODE § 11302(b) (West Supp. 1993) (defining appraisal as a statement prepared by an appraiser setting forth an opinion, in a federally related transaction, as to the market value of the property).

8. CAL. BUS. & PROF. CODE § 1088 (amended by Chapter 331); cf. *Larsen v. United Fed. Sav. & Loan Assoc.*, 300 N.W.2d 281, 287 (Iowa 1981) (allowing the purchaser of a home to recover damages caused by a negligent appraisal); *Stotlar v. Hester*, 582 P.2d 403, 407 (N.M. 1978) (reversing summary judgment entered against homeowners, stating that a factual issue existed regarding the appraiser's liability for performing a negligent appraisal), *cert. denied*, 585 P.2d 324 (1978); *Costa v. Neimon*, 366 N.W.2d 896, 898 (Wis. 1985) (holding that third parties not in privity, could recover for appraisers negligent misrepresentation). But cf. *Gay v. Broder*, 109 Cal. App. 3d 66, 75, 167 Cal. Rptr. 123, 127 (1980) (stating that the appraiser owed no duty, and was not liable for the negligent misrepresentation); *Baker v. Surman*, 361 N.W.2d 108, 111 (Minn. 1985) (stating that home buyers could not recover damages from the federal government for negligent appraisal done by its employee).

Business Associations and Professions; regulation of industrial hygienists

Business and Professions Code §§ 20700, 20701, 20702, 20703, 20704, 20705 (new).
SB 144 (Calderon); 1993 STAT. Ch. 1021

Under existing law, the State Department of Health Services¹ must establish standards of education and experience for certified industrial hygienists² employed in health departments.³ Chapter 1021 allows any certified industrial hygienist to obtain a stamp from an industrial hygiene certification organization certifying that the industrial hygienist has passed an industrial hygiene examination and has met the certification requirements of the organization.⁴ Chapter 1021 requires this stamp to be

1. See CAL. HEALTH & SAFETY CODE §§ 20, 100-117, 200-216 (West 1990) (defining the State Department of Health and Safety and establishing its authority); *id.* § 100 (West 1990) (establishing the State Department of Health Services).

2. See CAL. BUS. & PROF. CODE § 20700(b) (enacted by Chapter 1021) (defining certified industrial hygienist as a person who has met education, experience, and examination requirements of an industrial hygiene certification organization); *id.* § 20700(c) (enacted by Chapter 1021) (defining an industrial hygiene certification organization as a professional organization that has been established to improve the practice and educational standards of the profession of industrial hygiene through a certification process and has certified industrial hygienists in the state for at least the last five consecutive years); see also *id.* § 20700(a) (enacted by Chapter 1021) (defining industrial hygiene as the science and art devoted to the anticipation, recognition, evaluation, and control of environmental factors or stresses which may cause sickness, impaired health and well-being, or significant discomfort and inefficiency among workers or among the citizens of a community), *cf.* FLA. STAT. ch. 455.304 (1992) (regulating industrial hygienists licensing); 1993 Ill. Legis. Serv. 414 (West) (enacting the Industrial Hygienists Licensure Act).

3. CAL. HEALTH & SAFETY CODE § 1130 (West 1990); see *id.* § 1102(a)-(e) (West 1990) (listing the public health administrative organizations which are considered local health departments); *id.* § 1155 (West 1990) (stating that a local health department which does not meet requirements for training technical and professional personnel set by Department will not be appropriated funds); see also CAL. LAB. CODE § 6300 (West 1989) (enacting the California Occupational Safety and Health Act of 1973 for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards and assisting and encouraging employers to maintain safe and healthful working conditions); *cf.* CAL. BUS. & PROF. CODE § 7180 (West 1992) (requiring asbestos consultants to be certified by the Division of Occupational Safety and Health).

4. CAL. BUS. & PROF. CODE § 20702 (enacted by Chapter 1021); see SENATE RULES COMMITTEE, SENATE FLOOR ANALYSIS OF SB 144, at 2, (May 20, 1993) (emphasizing the need to regulate professionals who call themselves industrial hygienists in light of the fact that the need for them is growing while California has not regulated this profession, despite this profession's affects on public health); see also Melvin Fountain, *Safety: Whose Job is it Anyway?*, OCCUPATIONAL OUTLOOK Q., June 22, 1991, at 13; Michael Schachner, *Hygienists Can Aid Cities*, BUS. INS., June 5, 1989, at 16 (describing the nature and importance of the industrial hygienist in today's working environment in analyzing potential health problems for workers). See generally Carol Kleimer, *There's a Job Boom for Safety Engineers*, CHI. TRIB., Jan. 26, 1992, at 1 (stating that industrial hygiene is one of the top twenty careers for the 1990's); Margaret Mannix, *Some of the Fastest Growing Careers in Fields from Accounting to Telecommunications*, U.S. NEWS & WORLD REP., Nov. 11, 1991, at 97 (stating that the demand for industrial hygienists exceeds the supply).

affixed to documents prepared by the hygienist for an employer⁵, government agency⁶, or other consumer.⁷ Under Chapter 1021, it is an unfair business practice⁸ for persons to represent themselves as certified industrial hygienists without this certification.⁹ Chapter 1021 provides that an entity of state or local government¹⁰ may only regulate the practice of industrial hygiene by a certified industrial hygienist where it is authorized by statute to regulate a specific activity that may include the practice of industrial hygiene.¹¹

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5. See CAL. GOV'T. CODE § 7512.12 (West 1990) (defining employer).

6. See *id.* § 82041 (West 1990) (defining government agency).

7. CAL. BUS. & PROF. CODE §§ 20701, 20702 (enacted by Chapter 1021); see also *id.* § 302(c) (West 1990) (including in its definition of consumer any individual who seeks or acquires, by purchase or lease, any services for personal, family, or household purposes).

8. See *id.* § 17200 (West 1987) (establishing the Unfair Business Practices Act and including in the definition of unfair competition any unlawful, unfair, or fraudulent business practice and unfair, untrue, or misleading advertising); *id.* (stating that each statute governing a profession must define unfair business practices within that profession); *id.* (emphasizing that the purpose of the unfair competition clause is to protect consumers as well as competitors); *id.* (setting forth the general premise that false and misleading representations necessarily constitute unfair business practices); see also *id.* § 17500 (West 1987) (stating that it is unlawful for any person to perform services inducing the public to enter into any obligation with false or misleading statements and providing for a misdemeanor penalty punishing a person with a maximum of six month imprisonment, a maximum fine of \$2,500, or both). See generally *Bank of the West v. Superior Court*, 2 Cal. App. 4th 1254, 1266, 833 P.2d 545, 553, 10 Cal. Rptr. 2d 538, 546 (1992) (reviewing the scope and purpose of the Unfair Business Practices Act and its remedial provisions).

9. CAL. BUS. & PROF. CODE § 20704 (enacted by Chapter 1021); see *id.* § 20705 (enacted by Chapter 1021) (clarifying that Chapter 1021 does not apply to persons regulated under another licensing act or regulation who do not represent themselves as certified industrial hygienists, persons engaging in professional experience or apprenticeship gaining experience for certification, or students pursuing a professional education under supervised course of study).

10. See CAL. GOV'T. CODE § 811.2 (1988) (defining public entity).

11. CAL. BUS. & PROF. CODE § 20703 (enacted by Chapter 1021).

Business Associations and Professions; reposseors

Business and Professions Code § 7510.2 (new); §§ 7501.7, 7502.1, 7504, 7507.9, 7508.2, 7508.4, 7508.5 (amended); Financial Code §§ 22005, 24005 (amended); Government Code §§ 26751, 41612 (new).

AB 1972 (Horcher); 1993 STAT. Ch. 1269

Existing law authorizes the Director of the Bureau of Collection and Investigative Services (Director)¹ to conduct investigations² into the business of licensed reposseors.³ Existing law further authorizes the Director to issue written citations⁴ for specified statutory violations⁵ by licensees,⁶ qualified certificate holders,⁷ or registrants,⁸ and to deliver the

1. See CAL. BUS. & PROF. CODE § 7501 (West Supp. 1993) (establishing the Bureau of Collection and Investigative Services as a part of the Department of Consumer Affairs, under the control of the Director of the Bureau of Consumer Affairs); *id.* § 7501.1, 7501.2 (West Supp. 1993) (directing the governor to appoint a Chief of the Bureau of Collection and Investigative Services (Chief), to serve under the Director and to exercise the powers and duties of the Director).

2. See *id.* §§ 7501.4, 7501.5 (West Supp. 1993) (requiring the Chief to gather evidence of a repossession business operating without a license and to provide such evidence to the appropriate prosecuting authorities); *id.* § 16240 (West Supp. 1993) (stating that any person engaged in a business which, by state law, requires a license, and who does not possess such a license, is guilty of a misdemeanor); CAL. PENAL CODE § 16 (West 1988) (declaring public offenses to include misdemeanors); *id.* § 17 (West Supp. 1993) (defining misdemeanor); see also CAL. GOV'T CODE § 26500 (West 1988) (requiring the district attorney to conduct all prosecutions for public offenses); *Hicks v. Board of Supervisors*, 69 Cal. App. 3d 228, 241, 138 Cal. Rptr. 101, 108 (1977) (holding that no criminal proceedings may be instituted without the concurrence of the district attorney).

3. CAL. BUS. & PROF. CODE § 7501.5 (West Supp. 1993); see *id.* § 7500 (West Supp. 1993) (designating Chapter 11 of the California Business and Professions Code as the Reposseors Act); *id.* §§ 7500-7511 (West Supp. 1993) (encompassing Chapter 11 of the California Business and Professions Code); *People v. Shegog*, 184 Cal. App. 3d 899, 903-04, 229 Cal. Rptr. 345, 348 (1986) (describing some of the reasons for enactment of the Reposseors Act).

4. See CAL. BUS. & PROF. CODE § 7501.7 (amended by Chapter 1269) (requiring the citation to specifically name the state laws claimed to be violated and procedures for requesting a hearing; it may also include an order of abatement and an assessment of an administrative fine).

5. See *id.* (authorizing citations for specified fraudulent acts, misappropriation of property, unlawful entry, assault or battery, false representations, specified prohibitions on the conduct of the reposseor's business, specified prohibited acts of employees, or failure to notify the Bureau of a change of address).

6. See *id.* §§ 7500.1(f), 7506(a) (West Supp. 1993) (defining licensee); see also *id.* §§ 7503-7503.14 (West Supp. 1993) (setting forth specific requirements and specifications for repossession agency licenses); CAL. CODE REGS. tit. 16, § 600.1(d) (1993) (defining licensee).

7. See CAL. BUS. & PROF. CODE § 7500.1(g) (West Supp. 1993) (defining qualified certificate holder); see also *id.* § 7504 (West Supp. 1993) (setting forth the requirements for obtaining a qualification certificate).

8. See *id.* §§ 7506-7506.14 (West Supp. 1993) (describing the requirements for registration of employees of a repossession agency); *id.* §§ 7506.6, 7506.7 (West Supp. 1993) (exempting from registration qualified certificate holders and employees who do not work as reposseors).

citations by certified mail to the violator's address of record.⁹ Chapter 1269 requires that a copy of a citation, issued to a qualified certificate holder or registrant, also be mailed to the licensee's address of record, even if the licensee is not the violator.¹⁰

Existing law provides that any person who knowingly¹¹ engages a nonexempt,¹² unlicensed person¹³ to repossess personal property,¹⁴ is guilty of a misdemeanor.¹⁵ Under prior law, written notice by the Bureau of Collection and Investigative Services (Bureau)¹⁶ to the employer, advising the employer of the nonexempt, unlicensed status of the employee, was required.¹⁷ Chapter 1269 removes the requirement that the Bureau notify the employer of the unlicensed person's status, and, thus, makes the knowing engagement of a nonexempt, unlicensed person to repossess personal property a misdemeanor, regardless of whether the employer was notified in writing of the unlicensed person's status.¹⁸

Existing law requires that an inventory¹⁹ be made of any personal effects²⁰ contained in or on personal property when it is repossessed, and

9. *Id.* § 7501.7 (amended by Chapter 1269); *see id.* §§ 7503 (West Supp. 1993), 7504(3) (amended by Chapter 1269), 7506.5(a) (West Supp. 1993) (permitting the collection of the residence address of each licensee, qualified certificate applicant, or registrant).

10. *Id.* § 7501.7 (amended by Chapter 1269).

11. *See* CAL. PENAL CODE § 7 (West 1988) (defining knowingly as knowledge only of the existence of facts pertaining to an act or omission, without knowledge of the unlawfulness of such act or omission).

12. *See* CAL. BUS. & PROF. CODE § 7500.3 (West Supp. 1993) (declaring that banks, loan companies, attorneys, government employees, in-house repossessors with only one employer, and the legal owners of personal property sold under a security agreement are exempt from regulation as a repossession agency).

13. *See id.* § 7500.2 (West Supp. 1993) (defining repossession agency to include any person who accepts compensation to recover personal property); *id.* § 7502 (West Supp. 1993) (requiring every non-exempt person who engages in repossession activity in the state to possess a valid license).

14. *See id.* § 7500.1(u) (West Supp. 1993) (defining personal property).

15. *Id.* § 7502.1 (amended by Chapter 1269); *see id.* § 7502.1(a) (amended by Chapter 1269) (mandating a fine of \$5,000, imprisonment in county jail for no more than one year, or both).

16. *See* CAL. BUS. & PROF. CODE § 7501 (West Supp. 1993) (establishing the Bureau of Collection and Investigative Services as a part of the Department of Consumer Affairs, under the control of the Director of Consumer Affairs).

17. 1991 Cal. Legis. Serv. ch. 517, sec. 1, at 2190 (amending CAL. BUS. & PROF. CODE § 7502.1).

18. CAL. BUS. & PROF. CODE § 7502.1 (amended by Chapter 1269).

19. *See id.* § 7507.9 (amended by Chapter 1269) (describing the requirements of an inventory of personal effects contained on or in repossessed property); *People v. Shegog*, 184 Cal. App. 3d 899, 904, 229 Cal. Rptr. 345, 348-49 (1986) (holding that the interest of property owners in regaining possession of their personal effects found in repossessed personal property is the primary focus of the inventory requirement, rather than the owner's privacy interest in those personal effects). The court further held that the requirement that repossessors deliver contraband found in repossessed vehicles to police did not prevent police from inspecting the remaining noncontraband items found in the vehicle. *Id.* at 903, 229 Cal. Rptr. at 348.

20. *See* CAL. BUS. & PROF. CODE § 7500.1(v) (West Supp. 1993) (defining personal effects).

that such inventory contain, *inter alia*,²¹ an itemization of all storage charges made by the repossession agency.²² Chapter 1269 requires that the inventory also contain an itemization of all charges for the removal of the personal effects.²³

Existing law requires a reposessor to provide to the Chief of the Bureau,²⁴ a copy of any civil court judgment²⁵ obtained against the reposessor in an amount in excess of the current maximum small claims court limit.²⁶ Existing law also permits the Director to assess a fine against a reposessor who fails to submit a copy of a civil judgment obtained against the reposessor.²⁷ Chapter 1269 deletes the dollar amount which must be met to assess an administrative fine,²⁸ and substitutes the current maximum small claims court limit, making the prohibition statute consistent with the penalty statute.²⁹

Existing law delineates certain acts³⁰ for which fines may be assessed against a repossession employee.³¹ Chapter 1269 adds to the list of prohibited acts the employee's failure to report involvement in a violent act³² to the licensee or qualified certificate holder within twenty-four hours.³³

21. See *id.* § 7507.9 (amended by Chapter 1269) (requiring the inventory to contain a complete and accurate listing of all personal effects removed from repossessed personal property, the date and time the inventory is made, the signature of the employee who performs the inventory, the name, address, business hours, and telephone number of the person at the repossessing agency who may be contacted regarding recovery of the personal effects, and a notice that the personal effects will be disposed of if unclaimed within 60 days of the date of the notice).

22. *Id.*; see *id.* (requiring that the personal effects be securely stored in a labeled container at the agency location for a minimum of 60 days); *id.* § 7507.9(b)(1)-(3) (directing that deadly weapons, dangerous drugs, combustibles, and food, be disposed of rather than stored); see also *id.* § 7500.1(j)-(l) (West Supp. 1993) (defining dangerous drugs, deadly weapons, and combustibles).

23. *Id.* § 7507.9(d) (amended by Chapter 1269).

24. See *id.* § 7501.1 (West Supp. 1993) (directing the governor to appoint a Chief of the Bureau of Collection and Investigative Services, to serve under the Director and to exercise the powers and duties of the Director).

25. See CAL. CIV. PROC. CODE § 30 (West 1982) (defining a civil action).

26. CAL. BUS. & PROF. CODE § 7507.7 (West Supp. 1993); see CAL. CIV. PROC. CODE § 116.220 (West Supp. 1993) (setting the current maximum small claims court limit at \$5,000 for most matters).

27. CAL. BUS. & PROF. CODE § 7508.4(g) (amended by Chapter 1269).

28. See 1992 Cal. Legis. Serv. ch. 1072, sec. 4, at 4300 (amending CAL. BUS. & PROF. CODE § 7508.4) (allowing for the assessment of a fine for failure to submit a copy of a civil judgment in any amount over \$500).

29. CAL. BUS. & PROF. CODE § 7508.4(g) (amended by Chapter 1269).

30. See *id.* § 7508.5 (amended by Chapter 1269) (listing the submission of false or unauthorized reports, failure to register, failure to carry the Bureau-issued identification card or show it upon demand, and failure to return an identification card upon termination of employment).

31. *Id.*; see *id.* (permitting a fine of \$25 for each violation).

32. See *id.* § 7500.1(t) (West Supp. 1993) (defining violent act).

33. *Id.* § 7508.5(f) (amended by Chapter 1269); see *id.* § 7507.6 (West Supp. 1993) (requiring a report of a violent act to the Chief, on a form provided by the Bureau, within seven days of the act).

Existing law permits the Director to revoke a repossession agency license, qualification certificate, or registration under certain circumstances.³⁴ Chapter 1269 requires any person,³⁵ who has committed an act resulting in the revocation of a license, to dispose of any financial interest,³⁶ and to refrain from acquiring any financial interest, in any repossession agency within ninety days of such revocation.³⁷ Chapter 1269 also applies this restriction to the immediate family³⁸ of that person.³⁹

Existing law regulates the charges⁴⁰ which can be made by personal property brokers and consumer finance lenders.⁴¹ Under existing law, however, such regulations do not apply to actual fees of a set limit paid to a repossession agency for repossession of a motor vehicle.⁴² Chapter 1269 raises that fee limit to \$300.⁴³

Existing law requires any person repossessing a vehicle under a security agreement⁴⁴ to immediately notify the city police or sheriff's department of such a repossession.⁴⁵ Chapter 1269 requires the debtor to

34. *Id.* § 7510.1 (West Supp. 1993); *see id.* § 490 (West Supp. 1993) (permitting revocation of a license for conviction of a crime, provided the crime is substantially related to the business for which the license is issued); *id.* § 7510.1 (West Supp. 1993) (permitting suspension or revocation for, among other things, conviction of a felony); *Harrington v. Department of Real Estate*, 214 Cal. App. 3d 394, 402, 263 Cal. Rptr. 528, 532 (1989) (holding that an applicant, who intentionally defrauded members of the public, exhibited exactly the kind of conduct which the real estate licensing standards were established to prevent, and holding that a license should be denied the applicant); *Pieri v. Fox*, 96 Cal. App. 3d 802, 806, 158 Cal. Rptr. 256, 258-59 (1979) (holding that a misdemeanor conviction for making a false statement to obtain unemployment benefits in 1974 was not of a sufficiently substantial relationship to a 1978 real estate broker's license application to warrant denial of the license); *see also* CAL. CODE REGS. tit. 16, § 602 (1993) (defining substantially related).

35. *See* CAL. BUS. & PROF. CODE § 7500.1(a) (West Supp. 1993) (defining person).

36. *See id.* § 7510.2(e) (amended by Chapter 1269) (defining financial interest).

37. *Id.* § 7510.2(a)-(b) (amended by Chapter 1269). *But see id.* (permitting the disposal of any financial interest to be postponed by the Director to a time not to exceed 180 days from revocation).

38. *See id.* § 7510.2(f) (amended by Chapter 1269) (defining immediate family).

39. *Id.* § 7510.2(c) (amended by Chapter 1269).

40. *See* CAL. FIN. CODE §§ 22003 (West 1981), 24003 (West Supp. 1993) (defining charges).

41. *Id.* §§ 22450-22477, 24450-24477 (West 1981 & Supp. 1993); *see id.* (describing the loan regulations, including restrictions on charges, which apply to personal property brokers and consumer finance lenders); *see also id.* § 22009 (West 1981) (defining a personal property broker as one who lends money and takes security for a loan in the form of a contract involving forfeiture of rights to personal property); *id.* § 24009 (West Supp. 1993) (defining a consumer finance lender as anyone who makes consumer loans).

42. *Id.* §§ 22005(f), 24005(f) (amended by Chapter 1269); *see id.* (requiring that the personal property broker and consumer finance lender be in compliance with statutory provisions regarding loans secured by liens on motor vehicles).

43. *Id.*; *see* 1989 Cal. Stat. ch. 98, sec. 1, at 929 (amending CAL. FIN. CODE § 22005) (setting the limit applicable to personal property brokers at \$250); *see also* 1989 Cal. Stat. ch. 98, sec. 2, at 930 (amending CAL. FIN. CODE § 24005) (setting the limit applicable to consumer finance lenders at \$250).

44. *See* CAL. BUS. & PROF. CODE § 7500.1(p) (West Supp. 1993) (defining security agreement).

45. CAL. VEH. CODE § 28 (West 1987); *see id.* (requiring immediate notice of repossession to the appropriate authority by the most expeditious means possible, followed by written notice within 24 hours).

pay a fee⁴⁶ to the sheriff or city police department for filing the report of repossession before the vehicle is redeemed by the debtor.⁴⁷

CAS

Business Associations and Professions; securities broker-dealers and investment advisers—disciplinary action and disclosure

Corporations Code §§ 25212.1, 25232.3, 25247 (new); §§ 25212, 25232, 29544, 29550, 29572 (amended); Financial Code § 10005 (repealed and amended); Government Code § 6254.12 (new); § 6254.5 (amended).

AB 729 (Speier); 1993 STAT. Ch. 469

Under existing law, the licenses¹ of security² broker-dealers³ and investment advisers⁴ are subject to denial, suspension, or revocation by the

46. See CAL. GOV'T CODE §§ 26751, 41612 (enacted by Chapter 1269) (requiring that a fee of \$15 be paid to the sheriff or city police who receives and files the repossession notice). The debtor may alternatively pay the \$15 fee, plus a \$5 administrative fee, to the person in possession of the vehicle, who must release the vehicle to the debtor and transmit the fee to the appropriate authority within three days. *Id.*

47. *Id.*

1. See CAL. CORP. CODE § 25210 (West Supp. 1993) (requiring broker-dealers and agents who engage in securities transactions to obtain a certificate from the Department of Corporations); *id.* § 25230 (West Supp. 1993) (requiring an investment adviser to obtain a license).

2. See *id.* § 25019 (West Supp. 1993) (providing an extensive list of interests classified as securities in addition to any instrument or interest commonly known as a security); *People v. Skelton*, 109 Cal. App. 4th 691, 714, 167 Cal. Rptr. 636, 648 (1980) (providing that whether an instrument is considered a security should be considered on a case by case basis and directing courts to look at substance over form in determining whether the transaction involved conduct in a venture by persons other than the investor who is to share in its profits and ultimately in its proceeds), *cert. denied sub nom.*, *Curtin v. California*, 450 U.S. 917 (1981); *Bellerue v. Business Files Inst.*, 61 Cal. 2d 488, 490, 393 P.2d 401, 402, 39 Cal. Rptr. 201, 202 (1964) (holding that a transaction is classified as a sale of a security if an investor gives money to a company in exchange for an interest whereby he will receive a share of the profits); *Silver Hills Country Club v. Sobieski*, 55 Cal. 2d 811, 815, 361 P.2d 906, 908, 13 Cal. Rptr. 186, 188 (1961) (holding that a country club membership is a security because the purchaser risks capital).

3. See CAL. CORP. CODE § 25004 (West Supp. 1993) (defining broker-dealer as any person engaged in the business of effecting securities transactions either for his own account or the account of another, or any person who regularly issues or guarantees options on securities not of his own issue); *Stoll v. Mallory*, 173 Cal. App. 2d 694, 699, 343 P.2d 970, 973 (1959) (holding that a broker who helped locate a purchaser of a radio station was not a broker-dealer within the definition of the statute even though the transaction would require a transfer of stock).

4. See CAL. CORP. CODE § 25009 (West 1977) (defining investment adviser as any person who for compensation either advises others in the value of or the advisability of investing in securities, or one who regularly publishes reports concerning securities).

Commissioner of Corporations⁵ if they have violated specified securities acts or are subject to an order from specified state and federal regulatory agencies.⁶ Chapter 469 expands the Commissioner's authority to implement disciplinary actions for past orders from any of these specified state and federal regulatory agencies and for willful violations of the California Commodity Law of 1990.⁷ Chapter 469 also provides that the Commissioner may immediately revoke the license of a broker-dealer or

5. See *id.* § 25204 (West 1977) (granting authority to the Commissioner of the Department of Corporations to establish rules that are in the public's interest or to protect investors).

6. *Id.* §§ 25212, 25232 (amended by Chapter 469); see *id.* § 25212(d),(e) (amended by Chapter 469) (providing for disciplinary action on broker-dealers if they are: (1) Subject to an order of the Securities Exchange Commission or the securities administrator of any state, or (2) for willful violations of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, or the Commodity Exchange Act); *id.* § 25232(d),(f) (amended by Chapter 469) (providing for disciplinary actions on investment advisers under similar conditions); see also *Review of Selected 1990 California Legislation*, 22 PAC. L.J. 374 (1991) (discussing disciplinary actions with respect to commodities brokers); cf. DEL. CODE ANN. tit. 6, § 7314 (Supp. 1992) (requiring broker-dealers, investment advisers, and agents to be registered); FLA. STAT. ANN. § 517.12 (West Supp. 1993) (requiring dealers and investment advisers to be registered); MICH. COMP. LAWS ANN. § 451.604(a)(1)(F) (West 1989) (providing grounds for the revocation, denial, or suspension of the license of a broker-dealer or investment adviser and requiring a current order if the disciplinary action is pursuant to an order of the Securities and Exchange Commission or a securities administrator); *In re Scott*, 591 N.E.2d 312, 313 (Ohio Ct. App. 1990) (allowing the license of a securities salesman to be revoked under circumstances where the prohibited conduct was not part of, or related to activities within the scope of the license). See generally *Nationwide Investment Corp. v. California Funeral Services, Inc.*, 40 Cal. App. 3d 494, 503, 114 Cal. Rptr. 77, 82 (1974) (stating that the purpose of licensing statutes is to protect the public by requiring the licensee to achieve minimum levels of training and experience); *People v. Milne*, 690 P.2d 829, 834-35 (Colo. 1984) (stating that the purpose of the licensing requirement is to protect the public from the fraudulent activities of securities salesmen and requiring a license by a broker-dealer even if the securities or transaction is exempt from registration); *Oregon v. Crooks*, 734 P.2d 374, 376 (Or. App. 1987) (explaining that exemptions from securities registration laws should be construed in order to provide the greatest protection to the public).

7. CAL. CORP. CODE § 25212(d),(f) (amended by Chapter 469); see *id.* (authorizing disciplinary action on broker-dealers for past orders); *id.* § 25232(d),(f) (amended by Chapter 469) (authorizing disciplinary action on investment advisers for past orders); *id.* § 25232(e) (amended by Chapter 469) (permitting disciplinary action on broker-dealers for willful violations of the California Commodity Law of 1990); *id.* § 25232(e) (amended by Chapter 469) (permitting disciplinary action on investment advisers for willful violations of the California Commodity Law of 1990); *id.* § 29500 (West Supp. 1993) (providing that California Corporations Code §§ 29500-29572 may be cited as the California Commodity Law of 1990); cf. COLO. REV. STAT. § 11-51-410(1)(f) (Supp. 1992); N.J. REV. STAT. § 49:3-58(a)(vi) (West 1970); UTAH CODE ANN. § 61-1-6(f)(i) (1989) (providing for the revocation, denial, or suspension of the license of a broker-dealer and stating that if the reason for such action is a past order entered by the Securities and Exchange Commission or other securities agencies, the order must have been entered within the past five years); DEL. CODE ANN. tit. 6, § 7316(a)(6) (Supp. 1992) (similarly providing for the revocation, denial, or suspension of the license of a dealer or investment adviser but requiring that if the reason for such action is a past order entered by the Securities and Exchange Commission or other specified agencies, the order must have been entered within the past 10 years); FLA. STAT. ANN. § 517.161 (West Supp. 1993) (providing provisions for the revocation, denial, or suspension of the license of a dealer or investment adviser). See generally *Johnson-Bowles Co. v. Division of Sec.*, 829 P.2d 101, 116 (Utah Ct. App. 1992) (upholding the suspension of a broker-dealer's license by the Department of Securities stating that the reasonableness of sanctions is within the agency's discretion and would not be disturbed unless clearly unreasonable or is an abuse of that discretion).

investment adviser for failure to comply with a currently effective order of the Commissioner.⁸ Chapter 469 authorizes the Department of Corporations to disclose information regarding licensure status and disciplinary actions taken against a broker-dealer or investment adviser and requires such individuals, upon request, to provide a written notice to inform any new account holder of the location where this information may be obtained.⁹

CJK

Business Associations and Professions; sexual misconduct among healing arts practitioners

Business and Professions Code §§ 726, 729 (amended); Penal Code § 802 (amended).
SB 743 (Boatwright); 1993 STAT. Ch. 1072

8. CAL. CORP. CODE § 25212.1 (enacted by Chapter 469); *see id.* (providing for the immediate revocation of a broker-dealer's license); *id.* § 25232.3 (enacted by Chapter 469) (providing for the immediate revocation of an investment adviser's license); *cf.* *Stock v. Department of Banking and Fin.*, 584 So.2d 112, 114 (Fla. App. 1991) (holding that while an emergency situation may warrant the immediate suspension of a license, typically a formal proceeding must be promptly initiated). *See generally* Scot J. Paltrow, *House Panel to Weigh Stock Broker Rules*, L.A. TIMES, May 8, 1993, at D1 (stating that a House subcommittee was investigating whether the SEC and securities industry's organizations were adequately protecting small investors); Scot J. Paltrow, *Oversight, California and New York Have the Most Stockbrokers But the Weakest Regulatory Systems*, L.A. TIMES, July 5, 1992, at D1; Scot J. Paltrow, *Investors at Risk*, (pts. 1-5), L.A. TIMES, July 1, 1992, at A1, July 2, 1992, at A1, July 3, 1993, at D1, July 4, 1992, at D1, July 5, 1992, at D1 (discussing the lack of regulatory oversight and information concerning broker's disciplinary histories); Debora Vrana, *New Bill May Target Financial Spielsters on Cable Television*, L.A. BUS. J., March 8, 1993, at sec. 1, pg. 1, available in LEXIS, Nexis Library, Omni file (discussing the goal of increasing the authority of the Department of Corporations to impose disciplinary actions for past orders from certain regulatory bodies as a means to provide sufficient regulatory oversight of brokers and investment advisers who advertise in lengthy infomercials on cable television).

9. CAL. CORP. CODE § 25247(a) (enacted by Chapter 469); *see* CAL. GOVT. CODE § 6254.12 (enacted by Chapter 469) (authorizing the Department of Corporations to disclose information supplied to it by the North American Securities Dealers' Association/National Association of Securities Dealers' Central Registration Depository and the current license status and year of issuance).

Prior law prohibited sexual misconduct between specified members¹ of the medical profession and patients that was substantially related to the qualifications, functions or duties necessary to obtain a license to practice the particular profession.² Chapter 1072 subjects these members of the medical profession to disciplinary action for any act of sexual misconduct.³

Existing law criminalizes sexual contact between a psychotherapist⁴ and a current or former client.⁵ Chapter 1072 redefines sexual contact⁶ and extends the criminal penalty to physicians and surgeons.⁷ Chapter

1. See CAL. BUS. & PROF. CODE § 726 (amended by Chapter 1072) (providing that the provision covers every person licensed under Division 2 of the California Business and Professions Code as well as Chapter 17 of Division 3 of that Code). These members of the medical profession include physicians, psychologists, chiropractors, other healing arts practitioners and social workers. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 743, at 1 (July 13, 1993).

2. 1983 Cal. Stat. ch. 928, sec. 1, at 3345 (amending CAL. BUS. & PROF. CODE § 726).

3. CAL. BUS. & PROF. CODE § 726 (amended by Chapter 1072); see *id.* § 726 (excepting physicians and surgeons who provide medical treatment to their spouses or any person in a similar domestic relationship from the provisions of this section).

4. See *id.* § 728(c)(1) (West Supp. 1993) (defining psychotherapist as a physician or surgeon practicing psychotherapy or psychiatry, a psychologist or assistant, a clinical social worker or associate, a marriage, family, or child counselor or intern or trainee).

5. *Id.* § 729(a) (amended by Chapter 1072); see *Dresser v. Board of Medical Quality Assurance*, 130 Cal. App. 3d 506, 514-15, 181 Cal. Rptr. 797, 801-02 (1982) (holding that evidence in support of a finding that a psychologist had sexual relations with three patients was sufficient to justify the Medical Board's decision to revoke his license); *Bernstein v. Board of Medical Examiners*, 204 Cal. App. 2d 378, 383-85, 22 Cal. Rptr. 419, 422-23 (1962) (upholding the decision of the Medical Board to revoke the license of a psychologist who engaged in sexual relations with a 16-year-old patient); cf. FLA. STAT. ANN. § 491.0112 (West 1991) (criminalizing sexual misconduct between a psychotherapist and a patient); MINN. STAT. ANN. § 609.344(h)-(j) (West Supp. 1993) (criminalizing sexual misconduct between a psychotherapist and a patient).

6. See CAL. BUS. & PROF. CODE § 729(c)(2) (amended by Chapter 1072) (defining sexual contact as sexual intercourse or touching of the "intimate part" of another for sexual gratification, arousal, or abuse); CAL. PENAL CODE § 243.4(e) (West Supp. 1993) (defining touching as physical contact with the skin of another either directly, or through the clothes of either party); *id.* § 243.4(f)(1) (West Supp. 1993) (defining intimate part as the sexual organ, anus, groin, or buttock of either gender, or the breast of a female); see also ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 743, at 3 (July 13, 1993) (clarifying that physicians and surgeons will not be penalized for intimate touching occurring during the scope of a medical examination).

7. CAL. BUS. & PROF. CODE § 729(a) (amended by Chapter 1072); see also *Gromis v. Medical Bd.*, 8 Cal. App. 4th 589, 597-600, 10 Cal. Rptr. 2d 452, 459-60 (1992) (holding that existing law does not allow the Medical Board of California to discipline a physician who engaged in sexual relations with a patient if the doctor did not take advantage of his medical status in order to induce sex with the patient); *Atienza v. Taub*, 194 Cal. App. 3d 388, 390-91, 239 Cal. Rptr. 454, 455-56 (1987) (holding that sexual contact between a patient and a physician does not constitute medical malpractice if the physician did not induce sexual relations as part of prescribed treatment); Richard J. McMurray, American Medical Association, Report Of The Council On Ethical And Judicial Affairs (Dec. 4, 1990) (copy on file with the *Pacific Law Journal*) (recommending guidelines to be followed by physicians as to what constitutes unacceptable sexual conduct with a patient); Nanette K. Gartrell, M.D., *Physician-Patient Sexual Contact: Prevalence and Problems*, W. J. OF MED., Aug. 1992, at 157 (documenting the prevalence of sexual contact between physicians and patients); Alison Bass, *Licenses Revoked, Therapists Still Practicing; Disciplinary System Is Called Flawed*, BOSTON GLOBE, July 6, 1993, at Metro 1 (discussing the prevalence of doctors who continue to practice after having their licenses revoked for sexual

1072 does not apply to sexual contact between the medical professional and that professional's spouse or other person in an equivalent domestic relationship.⁸

SMK

Business Associations and Professions; telephone solicitations

Business and Professions Code §§ 17511.1, 17511.4, 17511.5, 17511.12 (amended).

AB 1421 (Umberg); 1993 STAT. Ch. 803

Existing law regulates the solicitation of sales by telephonic sellers.¹

misconduct with patients); Philip Hager, *Limits on Disciplining Physicians Upheld; Courts: State Justices Let Stand Ruling That Barred Action Against Doctors Who Have Sex With Patients Unless it is Proven That They Took Advantage of Their Status*, L.A. TIMES, Oct. 17, 1992, at 23 (outlining the holding in the appellate case *Gromis v. Medical Bd. of Cal.*); Scott Winokur, *Doctor's Sex With Patients Revealed; Nearly 10% of Physicians Ignore Professional Ethics, UCSF Study Shows*, SAN FRAN. EXAMINER, Aug. 7, 1992, at A1, A17 (summarizing the key findings of a UCSF study examining incidents of sexual misconduct between physicians and patients); cf. FLA. STAT. ANN. ch. § 458.329 (West 1991) (prohibiting sexual misconduct between a physician and a patient); MASS. GEN. LAWS ANN. ch. 112, § 5 (West Supp. 1993) (authorizing revocation of a psychiatrist's license for sexual misconduct with a patient); NEV. REV. STAT. ANN. § 641.230 (Michie 1991) (prescribing appropriate disciplinary actions taken against physicians for improper sexual relations with a client); N.H. REV. STAT. ANN. § 330-A:24 (1992) (defining sexual contact with a client as sexual misconduct subject to disciplinary action); WYO. STAT. ANN. § 33-26-508 (1992) (subjecting physicians who engage in sexual relations with clients to disciplinary action).

8. CAL. BUS. & PROF. CODE § 726 (amended by Chapter 1072).

1. CAL. BUS. & PROF. CODE § 17511(a) (West 1992); see *id.* (stating that the legislature has enacted provisions regarding telephonic sellers in order to protect consumers from fraud); *id.* § 17511.1 (amended by Chapter 803) (defining telephonic seller as a person who, on his own behalf or through a salesperson or an automatic dialing service, causes a telephone solicitation or an attempted telephone solicitation to occur); see also *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557, 561 (1980) (defining commercial speech as speech which serves the economic interests of the speaker and his audience); *Virginia State Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (defining commercial speech as speech which does no more than propose a commercial transaction); cf. *State v. Casino Mktg. Group*, 491 N.W.2d 882, 887 (Minn. 1992) (stating that telephonic solicitations are considered to be commercial speech). The *Casino Mktg.* court also stated that regulations concerning telephonic solicitations must serve a substantial governmental interest, directly advance that interest and not be more extensive than necessary to serve that interest. *Id.* See generally H.R. 868, 103rd Cong. 1st Sess. (1993) (introducing legislation which will give the Federal Trade Commission more power to regulate interstate telemarketers); Polly Bassore Elliot, *Sen. Bryan Takes Aim at Telemarketing Fraud*, STATES NEWS SERV., Mar. 12, 1993, at 1 (referring to H.R. 868 as the Consumer Protection Telemarketing Act and stating that it had passed the House by a 411-3 vote and had not received any formal opposition); *FTC Charges Two Telemarketers*, U.P.I., Sept. 18, 1990, at 1 (chronicling the arrest of two California telemarketers who had fraudulently obtained over \$100 million from elderly investors); *FTC Urges Fed and State Cooperation to Reduce Telemarketing Fraud*, VOICE TECH. NEWS, Aug. 25, 1992,

Existing law further requires that a telephonic seller maintain a bond in the amount of \$50,000 in favor of the State of California for any person² suffering pecuniary loss resulting from the unlawful practices of a telephonic seller.³ Chapter 803 requires that the amount of the bond be increased to \$100,000.⁴

Existing law requires that telephonic sellers register with the Department of Justice in order to do business within the state.⁵ Existing law exempts from the definition of telephonic seller, any issuer of securities who has a class of securities subject to section 12 of the Securities Exchange Act of 1934.⁶ Chapter 803 would additionally require that the securities be listed on a national securities exchange or designated as a national market system security in order for the exemption to be applicable.⁷

Existing law requires that a telephonic seller make certain disclosures to a prospective purchaser⁸ when engaging in a telephone solicitation.⁹

Vol. 4, No. 17, at 1 (declaring that telemarketing fraud costs Americans \$40 billion each year); Kim Murphy, *Precious-Metals Swindler Gets 12-Year Prison Sentence*, L.A. TIMES, Sept. 29, 1987, at 4 (stating that the number of fraudulent telemarketing firms in Southern California was growing).

2. See CAL. BUS. & PROF. CODE § 17511.2(d) (West 1992) (defining person as any individual, firm, association, corporation, partnership, joint venture or any other business entity).

3. *Id.* § 17511.12(a) (amended by Chapter 803).

4. *Id.*; see ASSEMBLY COMMITTEE ON WAYS AND MEANS, COMMITTEE ANALYSIS OF AB 1421, at 2 (May 25, 1993) (stating that AB 1421 will give consumers better recourse when they are trying to collect damages for telemarketing fraud); see also CAL. BUS. & PROF. CODE § 17511.4(i) (amended by Chapter 803) (mandating that no salesperson use the name of any other salesperson while soliciting).

5. CAL. BUS. & PROF. CODE § 17511.3 (West 1992); see Paul M. Alberta, *House Panel Eyes Telemarketer Registry To Help Combat Fraud*, D.M. NEWS, Jan. 6, 1992, at 1 (stating that the FTC was considering regulations which would require that the telemarketers be registered with the commission in order to combat fraud).

6. CAL. BUS. & PROF. CODE § 17511.1(e)(16) (amended by Chapter 803); see also 15 U.S.C. § 781 (1991) (setting out the provisions of the Securities Exchange Act of 1934).

7. CAL. BUS. & PROF. CODE § 17511.1(e)(16) (amended by Chapter 803). See generally *NFA Guidelines To Stamp Out Telemarketing Fraud Gets Industry Backing*, SEC. WEEK, Nov. 30, 1992, at 8 (stating that the National Futures Association was proposing guidelines to curb telemarketing abuses among member firms). The article further states that telemarketing fraud had resulted in a loss of integrity for the securities industry. *Id.*

8. See CAL. BUS. & PROF. CODE § 17511.2(f) (West 1992) (defining prospective purchaser as a person who is solicited to become, or does become obligated to a telephonic seller).

9. *Id.* § 17511.5 (amended by Chapter 803); see *id.* (requiring different information to be disclosed depending on whether the seller is offering gifts, precious metals or stones, oil or gas interests, or office equipment and supplies).

Chapter 803 will expand existing law by requiring greater disclosure on the part of a telephonic seller to a prospective purchaser.¹⁰

ELG

Business Associations and Professions; unlawful detainer assistants

Business and Professions Code §§ 6400, 6401.5, 6402, 6403, 6404, 6405, 6406, 6407, 6408, 6409, 6410, 6411, 6412, 6413, 6414, 6415 (new).

AB 1573 (Burton); 1993 STAT. Ch. 1011

Existing law regulates unlawful detainer¹ proceedings relating to a tenant of real property.² Chapter 1011 requires an unlawful detainer assistant³ to register with the county clerk and provide a bond or cash deposit in the amount of \$25,000.⁴ Chapter 1011 also requires the county

10. *Id.* § 17511.5(a)(1) (amended by Chapter 803); *see id.* (stating that when a telephonic seller represents that a purchaser will receive an item without charge as a promotional incentive, they must also disclose that no purchase is necessary to receive the goods, and that purchase of the goods for sale will not increase the buyer's chances of winning the greater valued goods). The seller must also state a means for the consumer to obtain the items or a chance of winning the items without purchase. *Id.*

1. *See* CAL. CIV. PROC. CODE § 1161 (West 1987) (setting forth acts constituting unlawful detainer).

2. *Id.* §§ 1159-1179a (West 1982) (West Supp. 1993); *see id.* (governing summary proceedings for obtaining possession of real property in certain cases); CAL. CIV. CODE § 658 (West 1982) (defining real property).

3. *See* CAL. BUS. & PROF. CODE § 6400(a) (enacted by Chapter 1011) (defining unlawful detainer assistant as any individual who provides assistance relating to an unlawful detainer claim or any bankruptcy petition which may affect the unlawful detainer action); *see id.* § 6403(a)-(b) (enacted by Chapter 1011) (allowing applications for an unlawful detainer assistant position to be filed by a natural person, partnership, or corporation).

4. *Id.* §§ 6402, 6405(a) (enacted by Chapter 1011); *see id.* § 6402 (enacted by Chapter 1011) (requiring an unlawful detainer assistant to be registered by the county clerk of the county in which the unlawful detainer assistant resides and in each county that the unlawful detainer assistant conducts business); *id.* § 6403 (enacted by Chapter 1011) (detailing information to be contained in the application for registration as an unlawful detainer assistant); *id.* § 6404 (enacted by Chapter 1011) (mandating that a fee of \$175 is to be paid by an applicant); *id.* § 6405(a)-(d) (enacted by Chapter 1011) (requiring a \$25,000 bond to be accompanied with the application); *id.* § 6405(e),(g) (enacted by Chapter 1011) (providing that \$25,000 cash may be deposited with the county clerk in lieu of a bond); *cf.* COLO. REV. STAT. ANN. § 26-7.8-103(1)(a) (West 1989) (permitting an authorized homeless prevention activities program to assist in avoiding eviction or foreclosure).

clerk to maintain a register of all unlawful detainer assistants and assign identification numbers and cards to each assistant.⁵

Chapter 1011 requires all contracts or agreements for service entered into by an unlawful detainer assistant to be in writing.⁶ Chapter 1011 also specifies information to be contained in a contract between a client and an unlawful detainer assistant and grants the client a right to rescind the contract within twenty-four hours.⁷

Chapter 1011 sets forth prohibited acts relating to unlawful detainer assistants.⁸ Chapter 1011 also authorizes the county clerk to revoke an unlawful detainer assistant's registration upon notice that the assistant has participated in specified unlawful conduct.⁹ Under Chapter 1011, a person

5. CAL. BUS. & PROF. CODE §§ 6407 (enacted by Chapter 1011); *see id.* (specifying the duties of the county clerk relating to registration of unlawful detainer assistants and describing the format of the identification card).

6. *Id.* § 6410(a) (enacted by Chapter 1011).

7. *Id.* § 6410(b)-(c) (enacted by Chapter 1011); *see id.* (detailing specific provisions which must be contained in the contract, including total cost, services to be performed, a notice that the unlawful detainer assistant is not an attorney, and also requiring that the contract be printed in the language of the client); *id.* § 6410(d) (enacted by Chapter 1011) (stating that, if the contract does not contain the specified provisions, it must be voidable at the client's option with any fees paid returned to the client); *id.* § 6410(e) (enacted by Chapter 1011) (granting the client a right to rescind the contract within 24 hours of signing and also requiring the unlawful detainer assistant to return any fees paid by the client less any fees for services which were actually, reasonably and necessarily performed).

8. *Id.* §§ 6408-6411 (enacted by Chapter 1011); *see id.* § 6408 (enacted by Chapter 1011) (requiring assistants to place their registration numbers in any advertisements or on their work product, including their pleadings); *id.* § 6409 (enacted by Chapter 1011) (stating that an unlawful detainer assistant is not permitted to retain any of the client's original documents); *id.* § 6411 (enacted by Chapter 1011) (prohibiting an unlawful detainer assistant from making false statements to the client, making any guarantees which are not in writing, stating that the unlawful detainer assistant has special influence with a governmental agency, or practicing law pursuant to California Business and Professions Code §§ 6125, 6126 or 6127); *id.* § 6415 (enacted by Chapter 1011) (stating that failure to comply with registration provisions, failure to include the assistant's registration number on advertisements or work product, retention of original client documents, or violation of California Business and Professions Code § 6411(a)-(c) is punishable as a misdemeanor); *see also id.* § 6125 (West Supp. 1993) (stating that only a person who is an active member of the State Bar may practice law); *id.* § 6126(a) (West 1990) (providing that any person who practices law while not an active member of the State Bar is guilty of a misdemeanor); *id.* § 6127 (West 1990) (providing that any person who holds himself out as practicing law in any court, who is not a member of the State Bar, is in contempt of the authority of the court); *People v. Landlords Professional Services*, 215 Cal. App. 3d 1599, 1608-09, 264 Cal. Rptr. 548, 553 (1989) (stating that assisting clients in the preparation and resolution of unlawful detainer actions and not merely providing clerical services constitutes practicing law).

9. CAL. BUS. & PROF. CODE § 6413 (enacted by Chapter 1011); *see id.* (permitting revocation of registration if the registrant has been found guilty of the unauthorized practice of law, has been found guilty of violating the provisions of the chapter relating to unlawful detainer assistants, or if a civil judgment has been entered against the registrant); *id.* § 6414 (enacted by Chapter 1011) (granting a registrant whose certificate has been revoked a right to challenge that revocation in a court of competent jurisdiction); CAL. PENAL CODE § 17(a) (West Supp. 1993) (defining misdemeanor).

who is awarded damages for injuries caused by the unlawful detainer assistant may recover against the bond or cash deposit.¹⁰

RMC

10. CAL. BUS. & PROF. CODE § 6412(a) (enacted by Chapter 1011); *see id.* § 6412(b) (enacted by Chapter 1011) (stating that if a recovery is made against the bond or cash deposit and the registration has not been revoked, the unlawful detainer assistant must return the bond or deposit to a balance of \$25,000 within 30 days).